Supreme Court, U. S.
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No. 80-656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

APPLING COUNTY, GEORGIA, JAUNICE PRESLEY, DAVID BURKE, BRICE BEECHER, BEN WEAVER, NORMAN HOLLIS and JOHNNIE THORNTON,
Plaintiffs-Petitioners,

versus

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA and GEORGIA POWER COMPANY,
Defendants-Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

Durwood T. Pye
PYE, GROOVER & DAILEY
2801 Buford Highway, N.E.
Suite 375
Atlanta, Georgia 30329
(404) 325-9411

Attorney of Record for Petitioners

OF COUNSEL
Emmett P. Johnson
Baxley, Georgia 31513
(912) 367-2476

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

THE QUESTION PRESENTED FOR REVIEW, EXPRESSED IN THE TERMS AND CIRCUMSTANCES OF THE CASE

A.

The sole question presented for review is whether the District Court had *subject matter jurisdiction* over plaintiffs' Complaint for Declaratory Judgment pursuant to 28 U.S.C. §2201,[1] praying declaration as to discrimination in ad valorem taxation.

Jurisdiction is alleged under *28 U.S.C. §1331(a)*[2] and under *28 U.S.C. §1343(3)*,[3] the jurisdictional counterpart of *42 U.S.C. §1983.*[4] The concerted action of defendants is alleged to constitute State action depriving plaintiffs of property without Due Process of Law and denying to plaintiffs the Equal Protection of the Laws, contrary to *Section 1 of the Fourteenth Amendment.*[5]

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[1] In case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. 28 U.S.C. §2201.

[2] The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. §1331(a).

[3] The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. 28 U.S.C. §1343(3).

The Court of Appeals affirmed the District Court on the basis of its order that, *"the Rule 12(b)(1) Motion to dismiss for lack of subject matter jurisdiction* is hereby *granted in favor of both defendants".*

B.

Subject matter jurisdiction presents several distinct questions in respect of (1) Appling County, Georgia; and (2) the individual plaintiffs Jaunice Presley, David Burke, Brice Beecher, Ben Weaver, Norman Hollis and Johnnie Thornton.[6]

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[4] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. §1983.

[5] No state "shall" deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[6] Appling County, Georgia, in its corporate capacity and in behalf of its citizenship and population; and Jaunice Presley, David Burke, Brice Beecher, Ben Weaver, Norman Hollis and Johnnie

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Thornton, as individual citizens and taxpayers, all as *plaintiffs; against* Municipal Electric Authority of Georgia, an instrumentality of the State of Georgia, and Georgia Power Company, a private utility, both as *defendants,* prayed declaration as to *ad valorem taxation* in respect of tangible property known as Plant Hatch, a nuclear power plant in the Power Company's Electric Light, Power and Hydro-Electric System, located in Appling County.

It was alleged that under Georgia law, the entirety of Plant Hatch was required to be *returned* for taxation at *full* market value, and *assessed* at 40% thereof (as was required for *all tangible property*), but that *defendants in unlawful combination* caused Plant Hatch to be *returned* at 82.3% of market value and *assessed* at *40% of said 82.3%.*

It was alleged that Plant Hatch, a unitary mass, in the exclusive possession, use and control of Georgia Power Company, was by contract in "undivided interests": 30% to Oglethorpe Electric Membership Corporation; 2.2% to City of Dalton; 17% to defendant Authority; and 50.1% to defendant Power Company.

Defendant Authority is favored with a statutory exemption from taxation as to its "property", and defendant Power Company in returning the plant for taxation *utilizes* this exemption as its own and thus omits 17.7% of value.

Neither Oglethorpe nor City of Dalton has a statutory tax exemption, although both are public corporations, and the public business of Oglethorpe is substantially identical with that of defendant Authority. It thus follows that the *entirety* of Plant Hatch is *neither returned nor* taxed; but omitted or excluded is an *undivided and unascertainable interest in the mass of this functioning machine.*

Resultant to Appling County from *denial of due process* is an annual loss of county taxes (belonging exclusively to the County under Georgia law), of over $800,000.00.

The individual plaintiffs are required to return their tangible property at full value and are assessed for taxation at 40% of *full* value; but resultant to them from *deprivation of equal* protection of the laws is the added burden of taxation caused by the omission from the return of Plant Hatch at 17.7% of its value.

The Complaint is at Appendix III and contains allegations of violation of the Constitution, Fourteenth Amendment.

Appling County, Georgia

C.

As to Appling County, Georgia, inquiry arises as to its *status* under the Constitution of the State of Georgia. The courts below held that it was without rights under the Fourteenth Amendment because:

> "A municipal corporation created by a State for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."[7]

The County, however, has Constitutional status and taxing authority.[8] The County is not a municipality.[9] The taxes levied for County purposes belong to the County and cannot be taken from it by the State.[10]

D.

Inquiry is presented as to whether Appling County is a "*person*" within the meaning of Section 1 of the Fourteenth Amendment, providing:

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[7] *Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933). Appendix I.

[8] Appendix VII.

[9] *Miree v. United States, etc.* 242 Ga. 126, 133.

[10] *Hargrave v. Lilly,* 69 Ga. 326(2), 327.

> "No State *shall* deprive any *person* of life, liberty or property without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws."

E.

Is the assertion by Appling County of the Federal rights of Due Process and Equal Protection so *patently* without merit that the Federal Courts are *without subject matter jurisdiction to determine it?*

F.

Appling County laying its claim *directly* upon the Constitution of the United States (the Fourteenth Amendment), the question is presented as to whether jurisdiction obtains under §*1331(a) (28 U.S.C.)* the jurisdictional amount (in excess of $800,000.00 annual taxes) appearing.

G.

As Appling County relies also on §*1983 (Title 42 U.S.C.)*, and its jurisdictional counterpart, *28 U.S.C.* §*1343(3)*, the question arises as to whether it is a *"person"* authorized by §1983 to proceed as *"the party injured"*, irrespective of amount, §1983 providing in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any . . . *person* within the jurisdiction thereof to the depriva-

> tion of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to *the party injured . . .*"

The Individual Plaintiffs

H.

The jurisdictional question which arises as to the individual plaintiffs in respect of their claim laid directly on the Constitution (Fourteenth Federal Amendment) is the *requisite jurisdictional amount* required by §1331(a). Is each individual plaintiff required to show an annual tax increase in excess of $10,000.00, or does the jurisdictional amount appear when *defendants stand to lose* over $10,000.00 annually (that is, defendants' taxes will be increased annually by more than $800,000.00)?

As To Both Appling County And The Individual Plaintiffs

I.

In respect of each, the question arises as to whether *State Action* is so alleged against defendant Municipal Electric Authority of Georgia and Georgia Power Company as to present this question for *adjudication upon the merits.*

J.

As to the County and as to the individual plaintiffs, the question is presented as to whether the Federal claims *are substantial in the subject matter jurisdictional sense.*

TABLE OF CONTENTS

Page

The Questions Presented For Review, Expressed In The Terms And Circumstances Of The Case i

- A. Sole Question is Subject Matter Jurisdiction i
- B. Distinct Questions in Respect of (1) Appling County, Georgia, and (2) the Individual Plaintiffs ii
- C. Inquiry Arises as to the Status of Appling County iv
- D. And as to Whether Appling County is a "Person" within the Fourteenth Amendment iv
- E. And as to Whether the Assertion of the County of Due Process and Equal Protection is so Patently Without Merit that the Federal Courts have no Jurisdiction to Determine it v
- F. And that, Appling County Laying its Claim *Directly* Upon the Constitution (the Jurisdictional Amount Appearing) Does Section 1331(a) Jurisdiction Obtain v
- G. And that, as Appling County Relies on Section 1343(3), is it a "Person" and "Party Injured" Within Section 1983 v

TABLE OF CONTENTS (Continued)

Page

The Individual Plaintiffs

H. Jurisdictional Amount is the Question vi

As to Both Appling County and the Individual Plaintiffs

I. State Action is a Question vi

J. A Question is Whether the Claims are Substantial vi

Table of Contents vii

Table of Authorities xii

Reference To The Reports Of Opinions Delivered In The Courts Below 2

Concise Statement Of The Grounds On Which Jurisdiction Of The Supreme Court Is Invoked 3

The Constitutional Provisions And Statutes Which The Case Involves 7

Concise Statement Of The Case Containing The Facts Material To Consideration Of The Questions Presented 10

A Direct And Concise Argument Amplifying The Reasons Relied On For The Issuance Of The Writ 15

Section 1331(a)—Appling County 16

Section 1331(a)—The Individual Defendants 22

TABLE OF CONTENTS (Continued)

Page

Section 1343(3) and Section 1983 (42 U.S.C.)

As to all Plaintiffs 24

Said Sections as to Appling County 25

As to the Individual Plaintiffs 25

Prayer for Writ 25

Certificate of Service 26

Appendix

I. The opinion and order delivered *per curiam* by the Court of Appeals upon the rendition of the judgment sought to be reviewed which contains as an appendix thereto the order of the District Court on the basis of which the judgment of the District Court was affirmed 1a

II. The judgment of the Court of Appeals sought to be reviewed 21a

III. Complaint omitting signatures of counsel, verification and summons 22a

IV. Motion to Dismiss Complaint filed by Municipal Electric Authority of Georgia, Grounds 1, 2, 3 and 4 only, omitting caption 64a

TABLE OF CONTENTS (Continued)

Page

V. Motion to Dismiss filed by Georgia Power Company, address to the Court and Ground 1 only, omitting caption ... 66a

VI. First Amendment of Plaintiffs and Order allowing same, omitting caption and signature of counsel and certificate of service 67a

VII. Georgia Counties, their Status, and Their Taxing Powers 68a

VIII. Georgia Constitution and Implementing Statute as to Exemption from Taxation 79a

IX. Excerpts from the Municipal Electric Authority of Georgia Act 80a

X. Excerpts from the Georgia Statutes Relating to Electric Membership Corporations 86a

XI. Excerpts from Georgia Constitution Relating to Construction and Operation of Electric Generating and Distribution Systems by Political Subdivisions from Proceeds of Revenue Certificates and the Taxation of Property thereof located outside the County 88a

TABLE OF CONTENTS (Continued)

Page

XII. The Provisions of the Georgia Constitution as to Uniformity of Taxation, Classification of Property, and Returns by Public Utilities 91a

XIII. Georgia Statutes as to Returns by Public Utilities 92a

XIV. Georgia Statutes as to Returns at Fair Market Value and Assessment at 40 Percent Thereof 97a

XV. *Bank of Tupelo v. Collier,* 191 Ga. 852 at pp. 855-858, being division 2 of the opinion and relating to Georgia law that when property is owned by tenants in common the joint property is liable for all the taxes 99a

XVI. The Constitution of the United States, Fourteenth Amendment, Section 1 ... 104a

XVII. 28 United States Code, Section 2201 .. 104a

XVIII. 28 United States Code, Section 1331(a) 105a

XIX. 28 United States Code, Section 1343(3) 105a

XX. 42 United States Code, Section 1983 .. 105a

XXI. Federal Rules of Civil Procedure 12(b)(1) 106a

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

The Fourteenth Amendment, Section 1 .... *passim*

UNITED STATES CODE SECTIONS

28 U.S.C. 1254(1) 3

28 U.S.C. 1331(a) .... *passim*

28 U.S.C. 1341 10

28 U.S.C. 1343(3) .... *passim*

28 U.S.C. 2101 3

28 U.S.C. 2201 .... i,7,8

42 U.S.C. 1983 .... *passim*

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(1) ii,9

GEORGIA CONSTITUTION, STATUTES AND CODE SECTIONS

Georgia Laws 1976, 639 6

Georgia Counties, their Status, and Taxing Powers, Appendix VII 9

Georgia Constitution and Implementing Statute as to Exemption from Taxation, Appendix VIII 9

Excerpts from the Municipal Electric Authority of Georgia Act, Appendix IX 9

TABLE OF AUTHORITIES (Continued)

Page

Excerpts from Georgia Statutes as to Electric Membership Corporations, Appendix X 9

Excerpts from Georgia Constitution as to Construction and Operation of Electric Generating and Distribution Systems by Political Subdivisions from Revenue Certificates and Taxation of Property located outside the County, Appendix XI 9,10

Provisions of Georgia Constitution as to Uniformity of Taxation, Classification of Property and Returns by Public Utilities, Appendix XII 10

Georgia Statutes as to Returns by Public Utilities, Appendix XIII 10

Georgia Statutes as to Returns at Fair Market Value and Assessment at 40 Percent Thereof, Appendix XIV 10

TABLE OF CASES

Allied Stores of Ohio v. Stanley J. Bowers, Tax Commissioner of Ohio, 358 U.S. 522, 3 L.Ed.2d 480 .6,19,23

Bank of Tupelo v. Collier, 191 Ga. 852, 857 21

Bell v. Hood, 327 U.S. 678, 682, 90 L.Ed. 939, 13 ALR 2d 383 5,21

TABLE OF CASES (Continued)

Page

Berryman v. Whitman College, 222 U.S. 334, 56 L.Ed. 225 22

Board of Trustees v. Outagamie County, 150 Wisc. 244, 2 ALR 465, 469 23

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 6 L.Ed.2d 45 21

California v. United States, 320 U.S. 577, 585-586, 88 L.Ed. 322 18

Chattanooga Foundry v. City of Atlanta, 203 U.S. 390, 396, 51 L.Ed. 241 18

County of DeKalb v. City of Atlanta, 132 Ga. 727 19

Cowell v. City Water Supply Company, 121 Fed. 53, 57 22

Dollar Savings Bank v. United States, 19 Wall. 227, 239, 22 L.Ed. 80 18

The Fair v. Kohler Die & S. Co., 228 U.S. 22, 25, 57 L.Ed. 716, 717 5

Georgia v. Evans, 316 U.S. 159, 86 L.Ed. 1346 18

Green v. Louisville, etc. R. Company, 244 U.S. 499, 61 L.Ed. 1280 23

Hagans v. Lavine, 415 U.S. 528, 39 L.Ed.2d 577 5

Hargrave v. Lilly, 69 Ga. 326(2), 327 .... iv,19

TABLE OF CASES (Continued)

Page

Hurn v. Oursler, 289 U.S. 238, 240, 77 L.Ed. 1148, 1150 5

Hutchins v. Howard, 211 Ga. 830(2) 23

Iowa-Des Moines v. Bennett, 284 U.S. 239, 247 23

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350, 351, 42 L.Ed.2d 477 21

Lafayette & Plaquemine v. Louisiana Power & Light Co., 435 U.S. 389, 55 L.Ed.2d 364 18

Lehnhausen v. Lake Shore Auto Parts Co., et al, 410 U.S. 356, 35 L.Ed.2d 351 5,6

Lofton Cotton v. United States, 11 How. 229, 231, 13 L.Ed. 675 18

Lynch v. Household Finance Corporation, 405 U.S. 538, 31 L.Ed.2d 424 24

Maine, et al v. Thiboutot, et vir, on Certiorari to the Supreme Judicial Court of Maine No. 79-838, decided June 25, 1980 25

Miller v. First Service Corporation, (8th Circuit) 84 Fed.2d 680, 109 ALR 1179 22

Miree v. United States, etc., 242 Ga. 126, 133 ..... iv,19

Monell v. Dept. of Soc. Services of City of New York, et al, 56 L.Ed.2d 611 18

Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249, 95 L.Ed. 912 5

TABLE OF CASES (Continued)

Page

Montgomery v. Suttles, 191 Ga. 781, 789 23

Mt. Healthy City Board v. Doyle, 429 U.S. 274, 50 L.Ed.2d 471 5,24

New York Life Insurance Company v. Swift (5th Circuit) 38 Fed.2d 175 22

Ohio v. Helvering, 292 U.S. 360, 78 L.Ed. 1307 18

Pfizer, Inc. v. Government of India, 434 U.S. 308, 54 L.Ed.2d 563 18

Sioux City v. Dakota, 260 U.S. 441, 445-447 23

Smith v. Adams, 130 U.S. 167, 175 22

Stanley v. Schwalby, 147 U.S. 508, 514-517, 37 L.Ed. 259 18

Township of Hillsborough v. Cromwell, 326 U.S. 620, 90 L.Ed. 358 23

Wasden v. Rusco, 233 Ga. 439 at 455 23

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 iv

ANNOTATIONS

109 ALR 317 22

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

APPLING COUNTY, GEORGIA, JAUNICE PRESLEY, DAVID BURKE, BRICE BEECHER, BEN WEAVER, NORMAN HOLLIS and JOHNNIE THORNTON,
Plaintiffs-Petitioners,

versus

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA and GEORGIA POWER COMPANY,
Defendants-Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE
OF THE UNITED STATES,

AND

THE HONORABLE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE
UNITED STATES,

AND

THE HONORABLE SUPREME COURT
OF THE UNITED STATES

The Petitioners (plaintiffs in the courts below), APPLING COUNTY, GEORGIA; JAUNICE PRESLEY; DAVID BURKE; BRICE BEECHER; BEN WEAVER; NORMAN HOLLIS; and JOHNNIE THORNTON; respectfully pray that the Writ of Certiorari issue to the UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to review the judgment and opinion of said Court adverse to Petitioners, affirming the judgment of the District Court dismissing Petitioners' Complaint for Declaratory Judgment for want of subject matter jurisdiction and entered against them on July 23, 1980, as set forth in the Opinion and Judgment of the Court of Appeals exhibited in the Appendix hereto.

REFERENCE TO THE REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals has not been published in official or unofficial reports. It appears in the Appendix as Item I. It attaches as an Appendix thereto the order and opinion of the District Court.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

(a) The judgment of the Court of Appeals sought to be reviewed was dated and entered July 23, 1980. Appendix II.

(b) The statutory provision conferring on the Supreme Court jurisdiction to review the judgment in question by writ of certiorari is at *28 U.S.C. §1254(1)*, providing:

> Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.
>
> *28 U.S.C. §2101(c) provides:*
>
> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may

extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(c) The Court of Appeals has decided an important question of Federal law which *has not been but should be settled by the Supreme Court,* viz, whether a country possessed by the State Constitution with territorial integrity and taxing authority, is a *"person"* within the meaning of §1 of the Fourteenth Amendment, and thus protected against deprivation by State Action of its property without Due Process of Law, and denial by State Action of the Equal Protection of the Laws, *to the extent that it may invoke the jurisdiction of the Federal Courts to assert claims under the Amendment.*

(d) Likewise, the important question of Federal law *which has not been but should be settled by the Supreme Court,* viz, whether such County may proceed as the *"person injured"* under *Title 42 U.S.C. §1983,* and its jurisdictional counterpart, *28 U.S.C. §1343(3).*

(e) The Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of the Supreme Court: *the question whether jurisdiction exists has been confused with the question whether the Complaint* states a *"cause of action".* The judgment and opinion of the Court of Appeals (adopting that of the District Court) is thus in conflict with decisions of the Supreme Court set out in the footnote.[11]

(f) The Court of Appeals, in adopting the opinion of the District Court, decided a Federal question *substantially in a way in conflict with applicable decisions of the Supreme Court.* Under the opinions below, the *Equal Protection Clause of the Fourteenth Amendment is without force* in respect of *exemption* from State taxation. The effect of the opinions below allows *exemption from taxation without limitation;* it being held that a *single parcel* of land, a unitary mass and functioning machine for the purpose of producing electricity, may be carved into undivided and unascertainable interests, *all of which interests are identical,* and that *one* such "interest" may be *singled* out and *exempted from all ad valorem taxation.* All opinions of the Supreme Court hold that the Equal Protection Clause *does apply* to State taxation and exemption therefrom.[12]

The opinions below, in construing the Complaint as omitting a jurisdictionally substantial claim, prevent plaintiffs from invoking the authority of the Federal Courts to *determine* whether the method of taxation and exemption here applied denies Federal Equal Protection.

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[11] *Montana-Dakota Utility Co. v. Northwestern Publ. Ser. Co.*, 341 U.S. 246, 95 L.Ed. 912 at 341 U.S. 249; *The Fair v. Kohler Die & S. Co.*, 228 U.S. 22, 25, 57 L.Ed. 716, 717; *Hurn v. Oursler*, 289 U.S. 238, 240, 77 L.Ed. 1148, 1150; *Mt. Healthy City Board v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471; *Bell v. Hood*, 327 U.S. 678, 90 L.Ed. 939, 13 ALR 2d 383; *Hagans v. Lavine*, 415 U.S. 528, 39 L.Ed.2d 577.

[12] *Lehnhausen v. Lake Shore Auto Parts Co., et al.* 410 U.S. 356, 35 L.Ed.2d 351.

(g) The Court of Appeals, in adopting the opinion of the District Court, *further precluded trial by the Federal Courts* of issues of Federal Equal Protection in respect of ad valorem taxation and exemption, for that the exemption of defendant Authority is *"palpably arbitrary"*, and constitutes an *"invidious discrimination"*, public corporations performing like functions being taxed (Oglethorpe Electric Membership Corporation, City of Dalton, political subdivisions operating electric generating and distribution systems).[13]

Statutes relating to Oglethorpe are at Item X of Appendix.

Statute relating to the City of Dalton is contained in *Georgia Laws 1976, page 639,* being the last paragraph of Item VIII of Appendix.

Excerpts from the Georgia Constitution relating to construction and operation of electric generating and distribution systems by political subdivisions from proceeds of revenue certificates and the taxation of property thereof located outside the County are in Item XI of Appendix.

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[13] *Allied Stores of Ohio v. Stanley J. Bowers, Tax Commissioner of Ohio,* 358 U.S. 522, 3 L.Ed.2d 480; *Lehnhausen v. Lake Shore Auto Parts Co., et al,* 410 U.S. 356, 35 L.Ed.2d 351.

Excerpts from the statutes creating the Authority are at Item IX of Appendix.

The Complaint is Item III of Appendix. See especially paragraphs 26, 27, 28, and also paragraphs 13, 14, 15, 23, 24, 29 and 32.

THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

1. Section 1 of the Fourteenth Amendment of the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 28 U.S.C. §2201:

> In case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any inter-

ested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

3. 42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. 28 U.S.C. §1343(3):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

5. 28 U.S.C. §1331(a):

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

6. Federal Rules of Civil Procedure 12(b)(1):

> . . . the following defenses may be at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter.

7. Provisions of the Constitution of the State of Georgia relating to Counties, their status and their taxing powers. Appendix VII.

8. Provisions of the Constitution of the State of Georgia authorizing the General Assembly to grant certain exemptions from taxation and the implementing statute. Appendix VIII.

9. Excerpts from the Municipal Electric Authority of Georgia Act of the General Assembly. Appendix IX.

10. Excerpts from the Georgia statutes relating to Electric Membership Corporations. Appendix X.

11. Excerpts from the Georgia Constitution relating to construction and operation of electric generating

and distribution systems by political subdivisions from proceeds of revenue certificates and the taxation of property thereof located outside the county. Appendix XI.

12. The provisions of the Georgia Constitution as to uniformity of taxation, classification of property, and returns by public utilities. Appendix XII.

13. Georgia statutes as to returns by public utilities. Appendix XIII.

14. Georgia statutes as to returns at fair market value and assessment at 40 percent thereof. Appendix XIV.

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

As the Amended Complaint was dismissed for want of *subject matter jurisdiction,* the facts are to be taken as those alleged. Complaint is Item III of Appendix and the Amendment is Item VI. Relevant portions of the Motion to Dismiss filed by the Authority are Item IV of the Appendix and those of the Power Company are Item VI of the Appendix.

The Courts below decided against defendants' contentions as to the Tax Injunction Act, *28 U.S.C. §1341;*

and against contentions as to abstention. Contentions also presented that plaintiffs' Constitutional claims were only anticipatory were rejected. See Opinion of the District Court, Item I of Appendix, divisions 1 and 2 of opinion. Defendants did not except to these rulings. Opinion of Court of Appeals is at Appendix Item I.

Complaint for Declaratory Judgment was brought by plaintiff Appling County to ascertain its tax base, and to include therein, if proper, the entirety of the tangible property of a newly-built nuclear generating works and plant called Plant Hatch, located on the River Altahama in Appling County, and of a value approaching one billion dollars. As the Plant was in the exclusive possession and use of Georgia Power Company and part of its electrical generating system, the Power Company was named a defendant, it being under the duty under Georgia Law to *return* the Plant for taxation at *full* value (to be *assessed* at 40% thereof).

Named as the other defendant was an instrumentality of the State of Georgia, Municipal Electric Authority of Georgia, created by the General Assembly to supply electrical energy at bulk rates to its membership (the County of Crisp and 47 municipalities), and denominated a "public charity" whose "property" is declared by the Assembly to be "public property" and exempt from taxation.

Plant Hatch is *returned* for taxation at *82.3% of value*, and *assessed* at 40% of 82.3%, there being *deducted* from the return *17.7%* of its value.

The *individual plaintiffs* are required to return *their tangible property* at *full* value; and they as *plaintiffs* assert *this discrimination.*

By the aforesaid deduction of 17.7% of value, *Appling County* sustains an annual loss of *over $800,000.00* in county taxes; and the *individual plaintiffs* have cast on them an *added burden of taxation.*

This tax discrimination is accomplished by contracts as follows: The Plant (though a unitary mass incapable of division) is "carved" into fractional "undivided interests": 50.1% to Power Company, 17.7% to Authority, the remainder to two public corporations, City of Dalton (2.2%) and Oglethorpe Electric Membership Corporation (30%). None claims a "tax exemption" except the Authority. The Power Company utilizes the Authority's aforesaid "exemption" so as to *exclude from its return of Plant Hatch* the aforesaid 17.7%.

The contract relationship between the Power Company, on the one hand and, on the other hand, Authority, Oglethorpe and City of Dalton, is set out in the Complaint in paragraphs 20 through 23; the Oglethorpe contracts are described in paragraph 26; the City of Dalton contracts in paragraph 27.

It is alleged that the Authority was authorized by the General Assembly to issue tax exempt bonds payable from revenues, and secured also as general obligations of its membership. That the Authority determined to issue one billion six hundred million dollars of such bonds (and additional amounts); that, after validation, from sale of such bonds to the public, funds were derived and $166,160,189 delivered to the Power Company, which executed a conveyance to the Authority of a 17.7% "undivided interest" in Plant Hatch; the Power Company retaining exclusive possession and use, and being free from accounting or partition; and other described contracts being entered into.

State Action is distinctly alleged in paragraph 8 of the Complaint.[14]

Jurisdiction is alleged in respect of Appling County and in respect of the individual plaintiffs pursuant to §*1331(a)*, the jurisdictional amount appearing, violation of the Constitution being directly charged. Jurisdiction also obtains pursuant to §*1343(3)*, irrespective of amount, a statutory right of action appearing under 42 U.S.C. §1983.

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[14] Municipal Electric Authority of Georgia, as the aforesaid public body corporate and politic, public corporation of the State of Georgia, political subdivision and creature of said State, under cover and color of the aforesaid Act of the General Assembly creating it, is undertaking to deny to the plaintiff, Appling County, and to the aforesaid individual plaintiffs as individuals and taxpayers, and the other taxpayers of Appling County, the equal protection of the laws, and to deprive plaintiffs of property without due process of law, in manner and form as will be hereafter more fully set out; and Georgia Power Company has agreed, contracted and confederated with said Authority in that regard and to the end that the equal protection of the laws shall be so denied, and that they shall be so deprived of due process.

Unless *removed* from taxation applicable to *all tangible property,* Plant Hatch is required to be returned at *full value. Unless* 17.7% of its value is excluded or exempted, all plaintiffs are entitled to declaratory relief.

The controversy between plaintiffs and defendants arises out of defendants' contention that 17.7% of the full value is relieved of ordinary ad valorem taxation by the aforesaid statutory exemption of the "property" of the Authority.

The Complaint presents issues of Federal law both from the standpoint that (1) Georgia law provides a tax exemption of said 17.7%; and (2) upon the contention that Georgia law does not so provide but that defendants have wrongly utilized the statutory exemption.

If Georgia law exempts said 17.7% of the value of the tangible property of Plant Hatch, *such exemption is void,* as without *rational basis,* and *palpably arbitrary,* there being no conceivable *reason* to *distinguish between* the several fractional "undivided interests" in the unitary Plant. Thus, such exemption does not meet the requirements of the Equal Protection Clause of the Fourteenth Amendment. It is contrary to elementary reason to tax one undivided interest in a functioning machine and exempt another.

Further, such law does not meet the requirements of the Equal Protection Clause of the Fourteenth Amendment for no rational distinction can be made between the Authority and Oglethorpe, both being public corporations engaged in the same business; or between Authority and political subdivisions operating electric generating and distribution systems as dealt with in the excerpts from the Georgia Constitution set out in Item XI of the Appendix. Nor can any rational distinction be made between the Authority and the City of Dalton as to the undivided interest of each in Plant Hatch. The State of Georgia is disabled by the Constitution of the United States and the Equal Protection Clause of the Fourteenth Amendment from exempting the Authority's property from taxation while with the same hand it taxes the property of these other public corporations; such property must be *all* exempted or it must be *all* taxed.

If the statutory exemption of the Authority is *not* applicable under Georgia law to the 17.7% undivided interest of the Authority in Plant Hatch, then and in that event there is a denial of Federal Due Process and Equal Protection for that defendants *misapply and misuse the* exemption under color of Georgia law.

A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Court of Appeals affirmed the District Court upon the basis of the District Court's order, which held: (1) The Constitutional claims of plaintiffs were so insubstantial as to defeat jurisdiction; (2) the claims of the individual plaintiffs cannot be based on Federal Question jurisdiction under *28 U.S.C. §1331(a)* for they fail to allege that the individual claims exceed $10,000; (3) Appling County has no standing to invoke the Federal Constitutional guarantees of Due Process and Equal Protection. "A municipal corporation * has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." (4) There are no sufficient allegations of State Action as to Georgia Power Company; (5) lack of substantiality undermines *§1343(3)* jurisdiction.

Section 1331(a)—Appling County

Appling County satisfies the jurisdictional amount for its tax loss is over $800,000.00 annually. The County alleges direct violation of the Equal Protection of Law Clause and the Due Process of Law Clause of the Fourteenth Amendment, and thus states a claim under *§1331(a)* unless the Court is without *subject matter jurisdiction* of Appling County, that is, *without jurisdiction to hear a case brought by the County in which it claims rights under the Fourteenth Amendment.* Certainly the federal courts have jurisdiction to decide whether Appling County has such rights. As we have pointed out, in the *cases cited in Note 11*, the Courts below have *confused* the question of *subject matter jurisdiction* with the question whether the Complaint sufficiently states a *"cause of action"*. The Courts below have gone further than that, viz, they have refused to *hear* Appling County *assert* that it is a *"person"* under the protection of the Fourteenth Amendment. Overlooked is the rule that Appling County, to obtain declaratory judgment, need not show upon the face of its Complaint that its contentions are correct. *It is sufficient* to show that it is entitled to declaration upon a Federal Claim.

To deny Due Process to Appling County is to deny Due Process to its citizenship and population to the extent that the County is disabled from proceeding in their behalf.

As the protections of the Fourteenth Amendment have been extended through the years by construction and applications of its principles of Due Process and Equal Protection; by broad application of the Amendment to State Actions; by broad construction of those who are "persons" within the meaning of the Amendment, and as such entitled to its protections; likewise the Amendment should now be construed to include units of State government within those entitled to invoke its guarantees.

There is no valid reason why Appling County should not be able to invoke against a public corporation generating and selling electricity and a private corporation engaged in the same general business, the right of Due Process of Law when they combine contrary to the Federal law to the injury and damage of its citizenship and population.

Both public and private corporations, including governmental bodies, are frequently considered "persons".[15]

Rulings that a municipality may assert no claims against the will of its "creator" are inapposite. True, the statute creating the Authority is an enactment of the General Assembly. Appling County, however, is not a creature of the General Assembly. It was continued in its existence and status by the people of Georgia in the enactment of the Georgia Constitution, the same instrument which created the General Assembly (which created the Authority). Moreover, complained of is the application of this statute, including its misapplication and misuse, not by the General Assembly, but by an instrumentality of the State in combination with a private utility.

Counties in Georgia are authorized to apply to the Courts for the protection of their territorial integrity, against proceedings which are contrary to Law, but attempted under a statute which cannot be constitutionally applied.[16]

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[15] *Monell v. Dept. of Soc. Services of the City of New York, et al,* 56 L.Ed.2d 611; *Lafayette and Plaquemine v. Louisiana Power & Light Co.,* 435 U.S. 389, 55 L.Ed.2d 364; *Pfizer, Inc. v. The Government of India,* 434 U.S. 308, 54 L.Ed.2d 563; *Stanley v. Schwalby,* 147 U.S. 508, 514-517, 37 L.Ed. 259; *Dollar Savings Bank v. United States,* 19 Wall. 227, 239, 22 L.Ed. 80; *Lofton Cotton v. United States,* 11 How. 229, 231, 13 L.Ed. 675; *Ohio v. Helvering,* 292 U.S. 360, 78 L.Ed. 1307; *California v. United States,* 320 U.S. 577, 585-586, 88 L.Ed. 322; *Chattanooga Foundry v. City of Atlanta,* 203 U.S. 390, 396, 51 L.Ed. 241; *Georgia v. Evans,* 316 U.S. 159, 86 L.Ed. 1346.

Appling County possesses by the State Constitution direct powers of taxation, direct authority for the rendition of important public services, including the power to zone.[17]

Appling County is not a municipality but is an arm of the State.[18] The taxes levied for County purposes belong to the County and cannot be taken from it by the State.[19]

The claim of Appling County that it is entitled to Federal Due Process and Equal Protection under the Fourteenth Amendment *is, in and of itself,* a *substantial Constitutional claim* (and one not decided but which should be decided by the Supreme Court).

If the Equal Protection Clause applies to taxation, as it does,[20] in the nature of things there is *some limit beyond*

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[16] *County of DeKalb v. City of Atlanta,* 132 Ga. 727.

[17] Appendix VII.

[18] *Miree v. United States,* 242 Ga. 126, 133.

[19] *Hargrave v. Lilly,* 69 Ga. 326(2).

[20] Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment.* But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526, 527, 3 L.Ed.2d 480.

which property of one class may be, in part, exempted, and in part, taxed. That which constitutes such limit is a substantial Federal question.

Here, one unitary mass of plant, machinery, land and equipment (a nuclear plant generating electricity) is *"divided"* so as to *exempt one* unascertainable interest, and *tax the remainder*. Is this *palpably artibrary?* Is it *without reason? These are substantial Federal questions to be determined upon regular trial.*

Here, the alleged *"reason"* for the classification is that the "undivided interest" which is exempted is *"public property"*. But, for *Equal Protection purposes, does this accord with the Fourteenth Amendment?* This is not *only a Federal question,* but one which is *substantial.* May an undivided interest in a unitary mass, which is of itself without value, be "classified" as "public property" so as to circumvent Equal Protection?

If it be *also* said there is a different *"ownership"*, the answer is found in the identical interest of Oglethorpe. Here there is also a *difference* of *ownership,* but it is a difference without *reason,* for the *public duties of Authority and Oglethorpe are the same.*

Thus, as to Appling County, there are *substantial questions* as to *Equal Protection;* and it necessarily follows there are substantial questions as to *Due Process* for the County, by Due Process of Law, is entitled to a return of the *full valuation of Plant Hatch.*

State Action sufficiently appears for *subject matter jurisdiction.* The *details of the contractual arrangements are alleged* and the *combination* by which the Fourteenth Amendment is sought to be *avoided.*

"Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[21]

"Where an action is brought under Section 1331, the catchall Federal Question provision requiring in excess of $10,000.00 in controversy, jurisdiction is sufficiently established by allegation of a claim under the Constitution or Federal Statutes, unless it 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction'."[22]

Another substantial Federal Question is presented by the allegations of the Complaint raising the contention that the 17.7% undivided interest is not by Georgia law subject to separate taxation or separate exemption from taxation, and that defendants, by excluding it, *wrongly utilized the statutory exemption of the Authority.* A single parcel is taxable as a whole; undivided interests are not separately taxable.[23] As such undivided interest cannot be severed from the whole for the purpose of taxation, *A fortiori,* it may not be severed for the purpose of exclusion or exemption from taxation. Not only is such undivided interest without market value, its severance would deprive the remaining interests of market value.

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[21] *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed.2d 45 at page 722 of 365 U.S.; *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 42 L.Ed.2d 477, at pages 350, 351 of 419 U.S.

[22] *Bell v. Hood*, 327 U.S. 678, 682, 90 L.Ed. 939, 66 S.Ct. 773, 13 ALR 2nd 383.

[23] *Bank of Tupelo v. Collier*, 191 Ga. 852, 857, Appendix XV.

A substantial Federal Question is presented as to whether such wrongful utilization of the statutory exemption of the Authority by State Action of *both* defendants as alleged in the Complaint constitutes a denial of Equal Protection and a deprivation of Due Process of Law.

Section 1331(a)—The Individual Defendants

The jurisdictional amount is satisfied as to the individual defendants for the reason that the amount or value in controversy is the subject matter of the litigation and it is measured by the pecuniary consequences to *either party.*[24]

The individual defendants are entitled to Federal Equal Protection which requires that their tangible property be taxed equally with that of other tangible property. They are here denied Equal Protection because they are required to return their tangible property at full value (to be assessed at 40%) while the tangible property of Plant Hatch is returned at 82.3% of full value (17.7% being excluded) and assessed at 40%.

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[24] *Berryman v. Whitman College,* 222 U.S. 334, 56 L.Ed. 225, ann. at page 317 of 109 ALR. See also *New York Life Insurance Company v. Swift* (5th Circuit) 38 Fed.2d 175; *Miller v. First Service Corporation* (8th Circuit), 84 Fed.2d 680, 109 ALR 1179; *Cowell v. City Water Supply Company,* 121 Fed. 53, 57; *Smith v. Adams,* 130 U.S. 167, 175.

The individual defendants have standing to attack this exclusion and exemption.[25]

As taxpayers, the individual defendants have a right to insist that others pay taxes, and a right to insist that the basis of return for assessment required of them be equal to that required of other taxpayers of the same class.[26] An unlawful exemption is a denial of uniformity.[27]

In *Green v. Louisville, etc. R. Co.*[28] the Complaint was based upon violation of the Federal Constitutional provision as to Equal Protection of the Laws arising out of lack of uniformity in the basis of tax assessment. The Supreme Court held at page 508 of 244 U.S.: "The contentions of Plaintiffs, set forth in their respective bills of Complaint, that the action of the Board of Valuation and Assessment in making the assessments under consideration and the threatened action of Defendants in respect of carrying those assessments into effect constitute action of the State, and if carried out would violate the Equal Protection provisions of the Fourteenth Amendments presents, without question, a real and substantial controversy under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the Federal Court, irrespective of the citizenship of the parties."

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[25] *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526, 527, 3 L.Ed.2d 480; *Wasden v. Rusco*, 233 Ga. 439 at 455.

[26] *Sioux City v. Dakota*, 260 U.S. 441, 445-447; *Iowa-Des Moines v. Bennett*, 284 U.S. 239, 247; *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 90 L.Ed. 358; *Hutchins v. Howard*, 211 Ga. 830(2); *Montgomery v. Suttles*, 191 Ga. 781.

[27] *Board of Trustees v. Outagamie County*, 150 Wisc. 244, 2 ALR 465, 469.

[28] 244 U.S. 499, 61 L.Ed. 1280.

28 U.S.C. Section 1343(3) and 42 U.S.C. Section 1983

AS TO ALL PLAINTIFFS

No jurisdictional amount is requisite.[29] The inquiry is whether a statutory action is alleged.[30]

Section 1983 protects proprietary rights, that is, rights of property as well as of persons.[31]

Substantial questions apply here as to allegations of State Action already referred to.

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[29] *Mt. Healthy City Board v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471 at 429 U.S. 278.

[30] 429 U.S. at p. 279.

[31] *Lynch v. Household Finance Corporation*, 405 U.S. 538, 31 L.Ed.2d 424.

APPLING COUNTY

Substantial questions as to whether the County has rights under the Fourteenth Amendment are here presented as above referred to, especially whether it has such right or standing as permits it to appear as a plaintiff asking adjudication.

Under Section 1343(3) and Section 1983, the further substantial question is presented as to whether the County is a "person" who may obtain redress under Section 1983. See *Maine, et al v. Thiboutot, et vir.*[32]

THE INDIVIDUAL PLAINTIFFS

There being no jurisdictional amount in respect of Section 1983, and the Supreme Court having held that this section protects rights of property, subject matter jurisdiction appears sufficient to invoke trial and judgment upon the substantial issues of Equal Protection of the Laws under the Fourteenth Amendment.

PRAYER FOR WRIT

WHEREFORE, Petitioners (plaintiffs below) pray that the Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit and that such proceedings be had as are in conformity with the law.

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[32] On certiorari to the Supreme Judicial Court of Maine No. 79-838, decided June 25, 1980.

Respectfully submitted,

Durwood T. Pye
PYE, GROOVER & DAILEY
2801 Buford Highway, N.E.
Suite 375
Atlanta, Georgia 30329
(404) 325-9411
Attorney of Record
for Petitioners

Emmett P. Johnson
Of Counsel

CERTIFICATE OF SERVICE

I, DURWOOD T. PYE, a member of the Bar of the Supreme Court of the United States, certify that three copies of the Application of Petitioners to the Supreme Court of the United States for the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were this day served on Municipal Electric Authority of Georgia, Respondent, by depositing said three copies in the United States Post Office in New Orleans, Louisiana, with first class postage prepaid, addressed to one of counsel of record for Municipal Electric Authority of Georgia at his Post Office address, counsel being L. Clifford Adams, Jr., Esquire, and said address being:

Messrs. Heard, Leverett & Adams
66 Luckie Street, N.W.
Suite 520
Atlanta, Georgia 30303

Also served in like manner, by mail as aforesaid, was Thomas S. Gray, Jr., Esquire, the other counsel of record for Municipal Electric Authority of Georgia, his Post Office address being:

Messrs. Oliver, Maner & Gray
P. O. Box 8343
Savannah, Georgia 31402

I also certify that three copies of said Application of Petitioners were served this day on Georgia Power Company, Respondent, by depositing said three copies in the United States Post Office in New Orleans, Louisiana, with first class postage prepaid, addressed to counsel of record for Georgia Power Company, at his Post Office address, counsel being Robert P. Edwards, Jr., Esquire, and his said address being:

Messrs. Troutman, Sanders, Lockerman
and Ashmore
1400 Candler Building
Atlanta, Georgia 30303

By the aforesaid service by mail, all parties required to be served have been served with the aforesaid Application for Writ of Certiorari.

Said service by mail was at my direction physically handled by Scofields' Quality Printers, P.O. Box 53096, New Orleans, Louisiana 70153.

This ____ day of October, 1980.

____

Durwood T. Pye

APPENDIX

I.

THE OPINION AND ORDER DELIVERED *PER CURIAM* BY THE COURT OF APPEALS UPON THE RENDITION OF THE JUDGMENT SOUGHT TO BE REVIEWED WHICH CONTAINS AS AN APPENDIX THERETO THE ORDER OF THE DISTRICT COURT ON THE BASIS OF WHICH THE JUDGMENT OF THE DISTRICT COURT WAS AFFIRMED.

APPLING COUNTY, et al.,
Plaintiffs-Appellants,

versus No. 79-1308

MUNICIPAL ELECTRIC AUTHORITY
OF GEORGIA, et al.,
Defendants-Appellees.

United States Court of Appeals,
Fifth Circuit.

July 23, 1980.

Appeal from the United States District Court for the Southern District of Georgia.

Before GEE, FAY and RANDALL, Circuit Judges.

PER CURIAM:

On the basis of the order of the district court, a copy of which is appended hereto, the above cause is AFFIRMED.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

APPLING COUNTY, JAUNICE PRESLEY,
DAVID BURKE, BRICE BEECHER,
BEN WEAVER, NORMAN HOLLIS, and
JOHNNIE THORNTON,
Plaintiffs,

versus C.A. No. 278-66

MUNICIPAL ELECTRIC AUTHORITY
OF GEORGIA and
GEORGIA POWER COMPANY,
Defendants.

ORDER

The above-styled action involves the collection of *ad valorem* taxes in Appling County, Georgia. Plaintiffs, the County, itself, and individual citizens and taxpayers of Appling County, seek to impose *ad valorem* taxes on that portion of the Edwin I. Hatch Nuclear Plant located in Appling County, which is owned by the Municipal Electric Authority of Georgia, hereinafter (MEAG). To this end, plaintiffs seek declaratory relief pursuant to 28 U.S.C. §2201, alleging that MEAG's interest in Plant Hatch is in fact not tax-exempted "property" and that defendant, Georgia Power, should pay taxes on Plant Hatch in its entirety. Plaintiffs allege further that the defendants have in combination "misused" MEAG's statutory exemption from taxation and have thereby deprived plaintiffs of due process and equal protection of the law. Defendants are also said to have violated the contract impairment clause in Article I of the Constitution. Plaintiffs pray that the Court declare that the entirety of Plant Hatch is subject to taxation, that MEAG's 17.7% interest is not exempt from taxation, or alternatively that the 17.7% interest is not exempt from taxation for the payment of principal and interest on certain County bonds. The case is presently before the Court on defendants' motions to dismiss on various grounds.

The purpose of the Municipal Electric Authority of Georgia which was created by the Georgia Legislature, *Ga. Code Ann.* §34B-401 et seq., is:

> ". . . to acquire and construct, and operate and maintain or cause to be constructed, oper-

> ated, and maintained electric generation and transmission facilities, and to take all other necessary or desirable action, in order to provide or make available an adequate, dependable, and economic supply of electric power and energy and related services for such of said political subdivisions of the State of Georgia as are hereinafter identified in section 34B-427, as may desire the same and, incidentally and so as to take advantage of economies of scale in the generation and transmission of electric power and energy, to other persons and entities."

Ga. Code Ann. §34B-403. The property of the Authority is declared by statute to be public property and is statutorily exempted from taxation by the State or any of its political subdivisions, *Ga. Code Ann.* §34B-406. Pursuant to *Ga. Code Ann.* §34B-407, 34B-408 and 34B-427, MEAG purchased from Georgia Power a 17.7% undivided interest in the Hatch Nuclear Plant. MEAG supplies electrical power to 47 political subdivisions in Georgia, though not to Appling County.

Defendants move to dismiss on grounds, *inter alia,* that the Court lacks subject-matter jurisdiction of the action. Of course, the fact that the plaintiffs seek declaratory relief under 28 U.S.C. §2201, does not absolve them of the necessity of bringing themselves within a jurisdictional statute. *See* 6A J. Moore, *Federal*

Practice ¶ 57.23 (2d ed. 1974); *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950). Plaintiffs attempt to bring themselves within the Court's federal question jurisdiction under 28 U.S.C. §1331, and they also allege subject-matter jurisdiction under 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343.

I.

28 U.S.C. §1341

Defendants argue that the Tax Injunction Act, 28 U.S.C. §1341, deprives the Court of jurisdiction and requires dismissal of the complaint. The Act provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

28 U.S.C. §1341. While a suit seeking declaratory relief can fall within the scope of §1341's prohibition, *Coon v. Teasdale,* 567 F.2d 820, 821 n.2 (8th Cir. 1977), under Fifth Circuit precedents, §1341 is inapplicable to the present action because it seeks not to inhibit the collection of taxes, but to require the collection of additional taxes. *See Hargrave v. McKinney,* 413 F.2d 320 (5th Cir. 1969). *See also Bland v. McHann,* 463 F.2d 21, 26 n.21 (5th Cir. 1972), *cert. denied* 410 U.S. 966, 93 S.Ct. 1438, 35

L.Ed.2d 700 (1973); *Battle v. Cherry*, 339 F.Supp. 186 (N.D. Ga. 1972).

Apart from 28 U.S.C. §1341, a judicially created doctrine of abstention appertains to cases in federal court involving state tax administration. *See, e.g., Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). However, this judicial abstention doctrine has also been held inapplicable where the suit seeks to require *additional* taxes. *Hargrave v. Kirk*, 313 F.Supp. 944 (M.D. Fla. 1970) (three-judge court), *reversed on other grounds sub nom., Askew v. Hargrave*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971). *Accord Cornelius v. Benevolent Protective Order of Elks*, 382 F.Supp. 1182 (D. Conn. 1974).

II.

28 U.S.C. §1331

Defendants cite *L & N R.R. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed.2d 126 (1908), for the proposition that a federal district court has subject-matter jurisdiction under §1331 only when plaintiff's statement of his own cause of action shows that it is based on federal law. *See also Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974). Defendants argue that there is no federal question jurisdiction under §1331 because the plaintiffs' Constitutional claims are alleged only in anticipation of a defense which the defendants will assert, *i.e.*, MEAG's statutory exemption from taxation. The allegations that Georgia Power did not really transfer any taxable "property" to MEAG when it conveyed the 17.7% interest in Plant Hatch, and that the defendants have "misused" MEAG's statutory tax exemption are clearly based on state law. However, plaintiffs' Constitutional claims cannot be characterized as merely anticipating the defense of MEAG's statutory exemption. Plaintiffs seek to impose *ad valorem* taxes on Plant Hatch in its entirety, alleging that under the *status quo,* they are being deprived of their constitutional rights of due process and equal protection. *Compare Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

There remains, however, the question of whether the Constitutional claims are so insubstantial as to defeat jurisdiction. *Compare Hagans v. Lavine,* 415 U.S. 528, 538-539, 94 S.Ct. 1372, 1380, 39 L.Ed.2d 577 (1974). The Court concludes that the question must be answered in the affirmative and that plaintiffs' Constitutional claims can fairly be characterized as insubstantial. From plaintiffs' complicated and lengthy pleadings, their Constitutional claims can be distilled to the following:

1. The fact that the County cannot tax the 17.7% of Plant Hatch which was conveyed to MEAG, coupled with the fact that MEAG's share of the electric power generated at Plant Hatch is transmitted to po-

litical subdivisions other than Appling County deprive plaintiffs of equal protection or due process, or both. (Under *Ga. Code Ann.* §34B-427, MEAG is authorized to contract to provide an electric power supply only with those political subdivisions of the state which ". . . on the date this Chapter becomes law own and operate an electric distribution system. Appling County is not among those political subdivisions.)[1]

2. The plaintiffs claim that their inability to tax Plant Hatch in its entirety constitutes a violation of the contract impairment clause because the County must pay the principal and interest on certain outstanding bonds from *ad valorem* proceeds, previously pledged to bond retirement.

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[1] Plaintiffs emphasize that they are *not* challenging the constitutionality of MEAG's statutory exemption itself. According to plaintiffs, the exemption is not properly applicable to MEAG's 17.7% interest in Plant Hatch. Plaintiffs contend that it is the *application* of the exemption in this situation which deprives them of due process and equal protection. As discussed above, the contentions that the exemption has been "misused" and that MEAG's interest in Plant Hatch is not tax-exempt property, are governed by state law. But whether the plaintiffs challenge the statutory tax exemption on its face, or only the operation of the exemption in this particular situation, the federal Constitutional question, as discussed below, is the same, *i.e.*, is the exemption rational or is it "palpably arbitrary?"

The insubstantiality of plaintiffs' Constitutional claims is evident from well established Supreme Court precedents:

> "This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation.
>
> * * * * * *
>
> "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subject to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it."

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245 (1937). The Supreme Court expounded on this principle in the recent case of *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-360, 93 S.Ct. 1001, 1004, 35 L.Ed.2d 351 (1973), a case involving an Illinois tax scheme which imposed a personal property tax on corporations, but not on individuals:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether

the difference in treatment is an indivious discrimination. *Harper v. Virginia Board of Elections,* 383 U.S. 663, 666, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526-527, 79 S.Ct. 437, 440, 3 L.Ed.2d 480:

> 'The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes

> > upon different trades and professions and may vary the rate of exercise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.'
>
> "In that case we used the phrase 'palpably arbitrary' or 'invidious' as defining the limits placed by the Equal Protection Clause on state power."

See *also Desco Products Caribbean, Inc. v. Government of Virgin Islands,* 511 F.2d 1157, 1160 (3d Cir. 1975); *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.,* 215 F.2d 542 (4th Cir. 1954), *cert. denied,* 348 U.S. 915, 75 S.Ct. 295, 99 L.Ed. 717 (1955); *South Carolina Power Co. v. South Carolina Tax Commission,* 52 F.2d 515 (E.D. S.C. 1931), *aff'd,* 286 U.S. 525, 52 S.Ct. 494, 76 L.Ed. 1268 (1932).

The Fifth Circuit has recently held that:

> ". . . a complaint which alleges the existence of a federal question establishes jurisdiction, so that a dismissal for lack of jurisdiction is appropriate only when the court decides that a claim is frivolous or insubstantial, i.e., a claim that has no plausible foundation, or when the court concludes that a prior Supreme Court decision clearly forecloses the claim. See *Bell v. Health-Mor, Inc.,* 549 F.2d 342, 344 (5th Cir.

> 1977); *Hilgeman v. National Ins. Co.*, 547 F.2d 298, 300 (5th Cir. 1977)."

Olivares v. Martin, 555 F.2d 1192, 1195 (5th Cir. 1977). Here, under standards well-established by the Supreme Court, MEAG's statutorily conferred exemption is valid unless irrational and ". . . when subject to judicial scrutiny [the exemption] must be presumed to rest on [a rational] basis if there is any conceivable state of facts which would support it." *Carmichael v. Southern Coal & Coke Co., supra*. Under this standard, the plaintiffs' Constitutional claims are clearly insubstantial, and lack any plausible foundation. The Georgia statutes creating and governing MEAG, *Ga. Code Ann.* §34B-401 *et seq.*, are patently rational and are free from arbitrary discrimination.[2]

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[2] The Supreme Court of Georgia has so held. *See Thompson v. Municipal Electric Authority of Georgia*, 238 Ga. 19, 231 S.E.2d 720 (1976). *Ga. Code Ann.* §34B-408(j) allows any Georgia citizen to become a party to proceedings involving the validation of the Authority's revenue bonds. In *Thompson, supra*, a citizen intervened in such proceedings and maintained essentially the same positions which plaintiffs take in the case *sub judice*, though the case did not involve Plant Hatch specifically. The Supreme Court rejected these arguments under the state Constitution. In this context, the uniformity provisions of the Georgia Constitution are substantially similar to the equal protection concept of the Fourteenth Amendment to the United States Constitution. *See* 71 Am.Jur.2d, *State and Local Taxation* §158 (1973). This Court does not base its ruling on the Georgia decision and does not hold that the *Thompson* case has any *res judicata* effect on plaintiffs herein, who were not parties to that litigation. *But Compare Battle v. Cherry*, 339 F.Supp. 186, 191-193 (N.D. Ga. 1972) for a case in which *res judicata* principles were applied on facts not greatly dissimilar from these.

A strikingly similar case is *Blackman v. City of Big Sandy, Texas,* 377 F.Supp. 771 (E.D. Tex. 1974), *aff'd,* 507 F.2d 935 (5th Cir. 1975). In that case, the owners of a service station challenged on Constitutional grounds a zoning ordinance which prohibited the sale of alcoholic beverages within 300 feet of any hospital, church or school. The standard for determining the Constitutional validity of the zoning ordinance was the same standard applicable to the tax exemption in the instant case, *i.e.,* is the ordinance rational or is it arbitrarily discriminatory? The district court held that the ordinance was clearly not arbitrary, and it dismissed the complaint, finding that no substantial federal question was presented. The Fifth Circuit affirmed.

The plaintiffs' contention under the Contract Clause of Article I, Section X, of the Constitution ["No state shall . . . pass any . . . law impairing the obligation of contracts"] is frivolous. Plaintiffs allege in Paragraph 31 of the complaint that from 1966 to 1974, Appling County has issued various general obligation bonds for hospital, courthouse, and school purposes. Plaintiffs allege further that:

> "These bonds are all now in the hands of purchasers who acquired the bonds in good faith, relying upon the contracts which resulted from the issuance and sale of the bonds, including the contract obligation which bound all the taxable property of Appling County for

the payment of the principal and interest on said bonds according to the laws then of force. * * * The actions of defendants whereby they undertake to exempt from taxation for the payment of said bonds the aforesaid 17.7% interest is in derrogation of the aforesaid contract. It is violative of the Constitution of the United States, Article I, Section X, providing that no State shall pass any law impairing the Obligation of Contracts, for the Authority acts as an instrunentality of the State of Georgia, pursuant to said Act of 1975 creating it, and Georgia Power Company confederates, combines and contracts to such unlawful end. So much of said Act of 1975, approved March 19, 1975 (Georgia Laws 1975, p. 107) as in Section 6 thereof provides that 'all of the property * of the Authority * are declared to be nontaxable for any and all purposes by the State or any of its political subdivisions'; so far as the same applies to taxation for the payment of the principal and interest on said bonds according to the tenor thereof, is null and void as violative of said Article I, Sec. X, of the Constitution of the United States, for the reason that there would be an impairment of the Obligations of Contracts if tangible property in Appling County subject to taxation for the payment of said bonds were exempted from said taxation after their issuance and sale. . . ."

Paragraph 31 of Plaintiffs' Complaint. The plaintiffs' theory seems to be that all property which was "taxable property" when the bonds were issued, must remain in the County tax base, at least for the payment of principal and interest on the aforementioned bonds.

Generally, when a political subdivision is authorized to contract and to exercise the power of taxation to meet its contractual obligations, the power to tax must continue until the obligations are satisfied. *See Louisiana v. Pilsbury,* 105 U.S. 278, 26 L.Ed. 1090 (1882); *Louisiana ex rel. Hubert v. New Orleans,* 215 U.S. 170, 30 S.Ct. 40, 54 L.Ed. 144 (1909); *W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298 (1935). But not every impairment of a contract violates the Contract Clause. That Clause does not prohibit a state from repealing or amending statutes generally or from enacting legislation with retroactive effects. The strictures of the Contract Clause must be reconciled with the "essential attributes of sovereign power." *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). *See also United States Trust Co. v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). Here, the exemption of 17.7% of Plant Hatch from taxation certainly reduces the *ad valorem* taxes which the County takes in, but there is no allegation that this reduction seriously impairs the County's ability to meet its obligations on the bonds.

Moreover, the complaint alleges that the bonds are held by unspecified good faith purchasers. The Court concludes that no plaintiff has standing to challenge MEAG's exemption on the basis that it impairs the rights of the holders of County bonds. *Compare Warth v. Seldin,* 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

The claims of the individual plaintiffs cannot be based on federal question jurisdiction under 28 U.S.C. §1331 for the additional reason that they fail to allege that their individual claims exceed $10,000. The complaint does allege that if the County could tax MEAG's interest in the Plant, it could collect an additional $831,550 in *ad valorem* taxes. The impact that this would have on individual taxpayers is unclear. Indeed, unless the millage rates were reduced there would be no apparent impact on individual taxpayers. Defendants note correctly that each plaintiff must meet the amount in controversy requirement. These claims are "several and distinct." *Alvarez v. Pan American Life Insurance Co.,* 375 F.2d 992 (5th Cir. 1967), *cert. denied* 389 U.S. 827, 88 S.Ct. 74, 19 L.Ed.2d 82 (1967). *See also Schreiber v. Lugar,* 518 F.2d 1099 (7th Cir. 1975); *Buckingham v. Lord,* 326 F.Supp. 218 (D. Mont. 1971); *Allanson v. Camp,* 324 F.Supp. 734 (N.D. Ga. 1971). *See generally, Annot.,* 2 A.L.R.Fed. 855, 868 (1969).

Citing *Trenton v. New Jersey,* 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923), MEAG argues that the County's claims should also be dismissed because the County has no standing to invoke the federal Constitutional guarantees of due process and equal protection against an enactment of the State of Georgia. The Court finds this argument persuasive. Plaintiffs allege that by virtue of the fact that the County cannot impose *ad valorem* taxes on MEAG's 17.7% interest of Plant Hatch, it is deprived of due process and equal protection. This allegation cannot be construed as anything other than a constitutional challenge to MEAG's state-conferred tax exemption, at least as applied to MEAG's interest in Plant Hatch. In *City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1254-1255 (5th Cir. 1976), the Court explained:

> "Ever since the Supreme Court's landmark decision in *Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), it has been apparent that public entities which are political subdivisions of states do not possess constitutional rights, such as the right to be free from state impairment of contractual obligations, in the same sense as private corporations or individuals. 17 U.S. (4 Wheat.) at 660-61, 4 L.Ed. at 664. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state. Id.; *Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015, 1020 (1933); see *Railroad Commission v. Los Angeles R. R.,* 280 U.S. 145, 156, 50 S.Ct. 71, 73-74, 74 L.Ed. 234, 329 (1929); *Risty*

> *v. Chicago, R. I. & P. R. R.*, 270 U.S. 378, 390, 46 S.Ct. 236, 241, 70 L.Ed. 641, 651 (1926); *City of New York v. Richardson*, 2 Cir. 1973, 473 F.2d 923, 929, cert. denied sub nom. *Lavine v. Lindsay*, 412 U.S. 950, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973). Thus, in *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923), the Supreme Court held that a city which had obtained its water resources by acquiring a private water company through proper exercise of its proprietary authority could not assert the right to freedom from impairment of contractual obligations because of the difference in the relation of private and public entities to the state. In contrast to private individuals and entities, municipal corporations have repeatedly been denied the right to challenge state legislation allegedly violative of the Federal Constitution. *Williams v. Mayor and City Council of Baltimore*, supra; *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 398, 39 S.Ct. 526, 528, 63 L.Ed. 1054, 1057 (1919) ("as respects grants of political or governmental authority to cities, towns, counties, and the like the legislative power of states is not restrained by the contract clause of the Constitution"); *City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 12 S.Ct. 142, 35 L.Ed. 943 (1891)."

The County argues that it *is* a person within the meaning of the Fourteenth Amendment:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law nor deny to any person . . . the equal protection of the laws."

The County relies on the Supreme Court's recent decision in *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), in which the Court held that a municipality was a "person" within the meaning of 42 U.S.C. §1983. However, *Monell* is inapposite to the present controversy. A County or City's lack of standing to challenge state legislation on federal Constitutional grounds is based on the rationale that:

> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal Constitution which it may invoke in opposition to the will of its creator."

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933).

The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. §1983, Congress intended to make municipalities and other political subdivisions amenable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal Constitutional grounds.

III

42 U.S.C. §1983 and 28 U.S.C. §1343

There is no amount in controversy requirement under §1983, but this statute restricts only "state action." Despite plaintiffs' conclusory allegations of concerted, combined and conspiratorial actions by the two defendants, with respect to their constitutional claims, plaintiffs do not sufficiently allege that defendant, Georgia Power Company, has acted under color of state law. *See generally, Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). The state action requirement is satisfied as to defendant MEAG, an official arm of the State.

However, the attempt to base jurisdiction on §1343 also fails as to defendant MEAG because, as discussed above, the plaintiffs' Constitutional claims are patently insubstantial. This lack of substantiality undermines §1343 jurisdiction as well as §1331 jurisdiction. *See, e.g., Howard v. State Department of Highways of Colorado,* 478 F.2d 581 (10th Cir. 1973).

In sum, the Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction is hereby granted in favor of both defendants. The clerk is directed to enter an appropriate judgment.

So Ordered, this 4th day of January, 1979.

/s/ Anthony A. Alaimo
Chief Judge, United States District
Court, Southern District of Georgia

II.

THE JUDGMENT OF THE COURT OF APPEALS SOUGHT TO BE REVIEWED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 19____

No. 79-1308

APPLING COUNTY, ET AL,
Plaintiffs-Appellants,

versus C.A. No. 278-66

MUNICIPAL ELECTRIC AUTHORITY
OF GEORGIA, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

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Before GEE, FAY and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

July 23, 1980

Issued as Mandate: Aug. 14, 1980

III.

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

APPLING COUNTY, and JAUNICE PRESLEY,
DAVID BURKE, BRICE BEECHER, BEN WEAVER,
NORMAN HOLLIS, and JOHNNIE THORNTON,
Plaintiffs,

versus C.A. No. CV 278-66

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA, and GEORGIA POWER COMPANY,
Defendants.

COMPLAINT

1.

The action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, providing that no State shall deprive any person of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; as hereinafter more fully appears. The action also arises under Article 1, Section 10, of the Constitution of the United States, providing that no State shall pass any law impairing the Obligation of Contracts; as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2.

Appling County was organized under the Act of the General Assembly of Georgia of December 15, 1818, and continued by the Constitution of the State of Georgia of 1976 as a body corporate with such powers and limitations as are provided in said Constitution and as prescribed by law, with authority to sue and be sued in its name (Article 9, Section 1, Paragraph 1, Georgia Laws, 1976, at p. 1303).

3.

The Board of Commissioners of Appling County, the governing and fiscal authority thereof, has authorized and directed the filing of this Complaint by order entered upon the Minutes of the official meeting of said Board held May 22, 1978. (Act approved February 12, 1945, Georgia Laws 1945, p. 650, as Amended, including Amendatory Act approved March 2, 1966, Georgia Laws 1966, p. 2754).

4.

Jaunice Presley, David Burke, Brice Beecher, Ben Weaver, Norman Hollis, and Johnnie Thornton are citizens of the State of Georgia and of Appling County, and taxpayers of Appling County, paying ad valorem taxes, and they sue as individuals, as such taxpayers, and in their own behalf and in behalf of the other ad valorem taxpayers of Appling County.

5.

Municipal Electric Authority of Georgia was created by the Act of the General Assembly of Georgia, approved March 18, 1975, and set out in Georgia Laws 1975, pp. 107-147, as a public body corporate and politic, a public corporation of the State of Georgia with perpetual existence, a political subdivision of the State, a creature of the State, having distinct corporate entity. Said corporation was created, as stated in said Act, so as to furnish an adequate, dependable and economical source or sources and supply of bulk electric power and energy for those political subdivisions of the State of Georgia, which, on the date on which the Act became law (March 18, 1975) owned and operated an electric distribution system.

6.

Georgia Power Company is a corporation organized and existing under the laws of the State of Georgia, organized for the purpose of pecuniary gain, a public utility, and engaged in the business of generating, transmitting and distributing electric power and energy in the State of Georgia and in the Southern Judicial District of Georgia. Said Georgia Power Company is engaged in the electric light, power and hydroelectric power business.

7.

Municipal Electric Authority of Georgia is doing business in the Southern Judicial District of Georgia. Georgia Power Company is doing business in the Southern Judicial District of Georgia, Brunswick Division. The claim which is the subject matter of this Complaint arose in the Southern Judicial District of Georgia.

8.

Municipal Electric Authority of Georgia, as the aforesaid public body corporate and politic, public corporation of the State of Georgia, political subdivision and creature of said State, under cover and color of the aforesaid Act of the General Assembly creating it, is undertaking to deny to the plaintiff, Appling County, and to the aforesaid individual plaintiffs as individuals and taxpayers, and the other taxpayers of Appling County, the equal protection of the laws, and to deprive plaintiffs of property without due process of law, in manner and form as will be hereafter more fully set out; and Georgia Power Company has agreed, contracted and confederated with said Authority in that regard and to the end that the equal protection of the laws shall be so denied, and that they shall be so deprived of due process.

9.

(a) Appling County for the discharge of the functions imposed upon it by law and the functions and services which it has undertaken pursuant to law is dependent upon ad valorem taxes assessed upon property in Appling County. The Constitution of the State of Georgia provides: All taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Classes of subjects for taxation of property shall consist of tangible property and one or more classes of intangible personal property including money. Except motor vehicles, including trailers, all tangible property, both real and personal, of every nature and character, is required to be taxed ad valorem and with uniformity. The Constitution authorizes the General Assembly to provide for a different method and time of returns, assessments, payment and collection of ad valorem taxes, of public utilities, but not a greater basis of value or at a higher rate of taxation than other properties. (The Constitution of 1976, Article 7, Sec. 1, Par. 3, Ga. Laws, 1976, at p. 1269).

(b) The rate of taxation is annually fixed in Appling County by the Board of Commissioners. Returns of all property except that of public utilities are required to be made as of January 1st (Ga. Code, Ann., Sec. 92-6202) by the taxpayers to the Tax Commissioner of the county, who succeeds to the duties of the Tax Collector and the Tax Receiver. (Act approved April 17, 1975, Ga. Laws, 1975, p. 4199). All persons or companies doing an electric light or power or hydroelectric power business (and other stated utility business) are required to make annual tax returns of all property located in the State to the State Revenue Commissioner (Ga. Code, Ann. Sec. 92-5902). These returns are required to be made to the State Revenue Commissioner by the first day of March in each year, as of January 1 preceding (Ga. Code, Ann. Sec. 92-5901). Said return is required to be a just, true and full return and to include all property or effects for which said company is subject to taxation (Ga. Code, Ann. 92-5903). Said taxpayer required to return its property to the State Revenue Commissioner shall apportion the value of its various properties in this State between the several tax jurisdictions in this State (Ga. Code, Ann. Sec. 92-5903). When the amount of the tax levy is assessed in Appling County by the aforesaid Board of Commissioners the same shall be certified and transmitted to the State Revenue Commissioner and the property of such company doing an electric light or power or hydro-electric power business is subject to taxation in Appling County, in respect of its property located therein, to the same extent and in the same manner that all other property is taxed; and the State Revenue Commissioner shall assess the tax at the rate fixed by the County Authorities upon the value of the property located in the county as shown by the returns; and said taxes shall be paid to the Tax Commissioner of the County by December 20th each year. (Ga. Code, Ann. Chapter 92-27).

(c) By the laws of Georgia all property shall be returned for taxation at its fair market value (Ga. Code, Ann., Sec. 92-5701). All tangible property subject to taxation by the State, any county or other taxing jurisdiction shall be returned by the taxpayers at its fair market value, and shall be assessed at 40% of said fair market value and taxed according to said 40% of its fair market value on the levy made by the taxing jurisdiction (Ga. Code, Ann., Sec. 92-5703). For the year 1977 (based upon returns as of January 1, 1977) the fair market value of tangible property (except motor vehicles including trailers) located in Appling County and returned for taxation was about $754,138,807.00; the 40% assessed value thereof amounted to about $301,655,522.80. Additionally, motor vehicles were taxed at a 40% valuation amounting to about $6,755,336.00. The total taxes, including the State Ad Valorem of one-quarter mill, but excluding the Stave levy on public utilities, amounted to $4,743,911.69, derived from the following sources:

General Digest	$ 803,979.13
Automobiles (motor vehicles including trailers)	107,477.39
Public Utilities	3,832,455.17

Taxes to pay the principal and interest and to provide a sinking fund for county hospital and court-house bonds hereinafter referred to amounted to $49,084.44; taxes for public schools amounted to $2,410,086.76; taxes to pay the principal and interest and to provide a sinking fund for the school bonds hereinafter referred to amounted to $153,033.96; and taxes for all other county purposes amounted to $2,113,264.04. The State one-quarter mill amounted to $18,442.49. The State levy on public utilities amounted to about $61,182.00. Said taxes were upon a rate for all county purposes aggregating fifteen and sixty-six one-hundredths (15-66/100) mills upon the dollar of assessed value; to pay the principal and interest and to provide a sinking fund for county bonds (two issues of hospital bonds maturing January 1, 1991, and one issue of court-house bonds maturing January 1, 1991), the assessed rate was sixteen-one-hundredths (16/100) mill; for public schools the assessed rate was eight (8) mills; to pay the principal and interest and to provide a sinking fund for school bonds (1974 Appling County School District Bonds maturing January 1, 1995) the assessed rate was one-half (½) mill; and for all other county purposes the assessed rate was seven (7) mills. To this total county rate of fifteen and sixty-six one-hundredths (15-66/100) mills there was one-quarter (¼) mill added as State of Georgia taxes.

10.

(a) By the Constitution of the State of Georgia it is provided that the General Assembly may authorize any county to exercise the power of taxation for any public purpose as authorized by general law or by this Constitution. Additionally, counties are authorized to exercise the power of taxation for the following purposes:

1. Pay the expenses of administration of the county government.

2. Acquire, construct, maintain, improve, or aid in the acquisition, construction, maintenance, or improvement of public buildings, bridges, parks, recreation areas and facilities, libraries, streets, sidewalks, roads, airports, docks, facilities for mass transit system for the transportation of passengers for hire, and

other properties for public use, and to acquire any real property or any interest therein in connection with the foregoing.

3. Provide for the operation of the courts, the maintenance and support of prisoners, and the handling of litigation affecting the county.

4. Establish and conduct public health and sanitation programs and provide for the collection and preservation of records and vital statistics.

5. Establish and maintain a county police department.

6. Provide medical or other care and hospitalization for the indigent sick and to support paupers.

7. Pay county agricultural and home demonstration agents and conduct programs utilizing the services of such agents.

8. Establish and conduct programs of welfare benefits and public assistance as may be provided by law.

9. Provide fire protection for forest lands and conserve natural resources.

10. Provide insurance, retirement and pension benefits, coverage under Federal Old Age and Survivors' Insurance programs and other stated benefits.

11. Establish and maintain a recreation system.

12. To provide for paying the principal and interest of any debt of the county and to provide a sinking fund therefor.

13. To provide for reasonable reserves for public improvements as may be fixed by law.

14 To provide for the support and maintenance of public schools, public education and activities necessary and incidental thereto, including school lunches, upon the assessed value of all taxable property within the county, exclusive of any independent school system therein.

(Constitution of Georgia of 1976, Article IX, Section V, Paragraph II, Ga. Laws 1976, pp. 1314-1316).

(b) By the Constitution of Georgia it is provided that in addition to and supplementary of any powers now conferred upon and possessed by any county, municipality or any combination thereof, powers may be exercised and services provided, including the following:

1. Police and fire protection.

2. Garbage and solid waste collection and disposal.

3. Public health facilities and services; including hospitals, ambulance, emergency rescue services, and animal control.

4. Street and road construction and maintenance; including curbs, sidewalks, street lights and devices to control the flow of traffic on streets and roads constructed by counties and municipalities or any combination thereof.

5. Parks, recreational areas, programs and facilities.

6. Storm water and sewage collection and disposal systems.

7. Development, storage, treatment and purification and distribution of water.

8. Public housing.

9. Urban redevelopment programs.

10. Public Transportation system.

11. Libraries.

12. Terminal and dock facilities and parking facilities. (Constitution of Georgia of 1976, Art. 9, Sec. 4, Par. 2, Acts of 1976 at p. 1311-1312).

(c) By Acts of the General Assembly of Georgia collected in Ga. Code, Ann. Supp., Sec. 92-3701, it is provided that county taxes may be levied and collected for the following purposes:

1. To pay the expenses of administration of the county government.

2. To pay the principal and interest of any debt of the county and to provide a sinking fund therefor.

3. For educational purposes upon property located outside of independent school systems.

4. To build and repair the public buildings and bridges.

5. To pay the expenses of courts, the maintenance and support of prisoners and to pay sheriffs and coroners and for litigation.

6. To build and maintain a system of county roads.

7. For public health purposes in said county, and for the collection and preservation of records of vital statistics.

8. To pay county police.

9. To support paupers.

10. To pay county agricultural and home demonstration agents.

11. To provide for payment of old-age assistance to aged persons in need, and for the payment of assistance to needy blind, and to dependent children and other welfare benefits.

12. To provide for fire protection of forest land and for the further conservation of natural resources.

13. To provide medical or other care, and hospitalization, for the indigent sick people of the county.

14. To acquire, improve and maintain airports, public parks, and public libraries.

15. To provide for workmen's compensation and retirement or pension funds for officers and employees.

16. To provide reasonable reserves for public improvements as may be fixed by law.

17. To pay pensions and other benefits and costs under a teacher retirement system or systems.

18. For school lunch purposes, upon property located outside of independent school systems, to provide for payment of costs and expenses incurred in the purchase, replacement and maintenance of school

lunchroom equipment, purchase of school lunchroom supplies, transportation, storage and preparation of foods, and all other costs and expenses incurred in the operation of school lunch programs, but excluding purchase of foods.

19. Ambulance services.

20. To provide for financial assistance to local county development authorities for the purpose of developing trade, commerce, industry and employment opportunities.

It is further provided (Ga. Code, Chapter 92-37) that county taxes may be levied, for current expenses and accumulated debts; an additional tax not to exceed two and one-half (2½) mills for county purposes; and an extra tax for county buildings; and for county agriculture and home demonstration agents; and for public health and sanitation purposes.

11.

Pursuant to the authority set forth in the Constitution and laws of the State of Georgia and as referred to in Paragraph 10 above, Appling County exercises powers and provides services as follows:

(a) Administers the county government, such administration including the governing and fiscal functions of the Board of Commissioners, its officers and employees, the duties and functions of the Tax Assessor, and the Tax Commissioner, and their offices.

(b) Registration of voters and elections by the people.

(c) Civil defense.

(d) Maintains public schools.

(e) Provides for the courts; maintenance and support of prisoners and for the sheriff, his deputies; and the coroner. The expenses of the Superior Court not paid by the State are paid by Appling County; the county maintains the Probate Court, the State Court and the Small Claims Court. Grand and petit jurors are provided for, and the expenses of court officials. The Clerk of the Superior Court and his office are maintained. The jail is provided.

(f) Builds and repairs the public buildings and bridges and maintains the county shop.

(g) Builds and maintains the county roads and bridges.

(h) Public health services, including the health department.

(i) Agricultural services.

(j) Supports paupers, provides old-age assistance, assistance to the needy blind, dependent children and other welfare benefits and family and children services.

(k) Forestry services.

(l) Ambulance services.

(m) Industrial development authority.

(n) Area planning and development commission.

(o) Provides hospitalization, medical and related care and maintains a rescue squad.

(p) Regional library maintenance.

(q) Sanitation.

(r) A fire department is maintained in cooperation with the City of Baxley.

(s) In cooperation with the City, recreation is provided for.

12.

It will be necessary for the Board of Commissioners of Appling County to annually assess taxes hereafter in order to provide for the responsibilities and services required and authorized by law.

13.

Georgia Power Company operates in Appling County, as a part of its electric light, power and hydro-electric power business, a plant and works for the generating of electricity known as Edwin I. Hatch - Nuclear Plant, which includes in its properties two 807 MWe nominally-rated nuclear generating units known as the Edwin I. Hatch Nuclear Units Nos. 1 and 2. Said plant, which is on the Altahama River, comprises about 2,244.08 acres as delineated on plat recorded in Plat Book 8, page 35, in the office of the Clerk of the Superior Court of Appling County, as corrected by Affidavit of C. H. Wright, recorded in said Plat Book 8, page 198. Of said total acreage 1,337.43 acres are located in Appling County and 906.65 in Tombs County. Adjunct to said plant and works is a railroad with its appurtenant properties known as the Edwin I. Hatch Nuclear Plant Railroad, which railroad property is delineated on plat recorded at said Plat Book 8, pages 36, 37 and 38.

14.

Said Edwin I. Hatch Nuclear Plant and its tangible properties, together with said railroad and the tangible properties incident thereto, located in Appling County, were of a fair market value on January 1, 1978, of about three-quarters of one billion dollars. At that time Edwin I. Hatch Nuclear Unit No. 2 had not been completed, and the progress of work thereon increases the fair market value of said plant and works, so that on January 1, 1979, the fair market value of said plant and works will approach one billion dollars.

15.

The tangible properties of said plant and works and railroad aforesaid are subject to taxation under the laws of Georgia, should be returned to the State Revenue Commissioner as provided by law, and taxes paid on an assessment at 40% of its fair market value to the Tax Commissioner of Appling County in respect of those tangible properties of said plant and works located in Appling County.

16.

Notwithstanding what is set out above, the properties of said plant and works and railroad are not returned for taxation, but 17.7% thereof is claimed to be exempt from taxation as the property of said Authority. Defendants fail and refuse to return same for taxation, and refuse to pay any taxes thereon.

17.

Said 17.7% of the aforesaid properties in Appling County was, on January 1, 1978, of a fair market value of not less than $137,750,000.00. It should be assessed at 40% of said fair market value, to-wit: $53,100,000.00. This would produce for Appling County (based upon the 1977 millage) $831,550.00 in taxes. Included in this amount would be $8,500.00 to pay the principal and interest and to provide a sinking fund for the aforesaid county bonds; $26,550.00 to pay the principal and interest and to provide a sinking fund for the aforesaid school bonds; $424,800.00 for public schools; and $371,700.00 for all other county purposes.

18.

To withhold from Appling County the aforesaid taxes justly due upon said 17.7% of said plant and works, and to annually deprive Appling County of said taxes, deprives Appling County of revenues useful and essential in the discharge of the responsibilities placed upon it by the Constitution and laws of the State of Georgia, and the rendition of the services which it is authorized to render to the citizens, taxpayers and population of Appling County and which services are needful for peace, order, health, safety, public education, welfare and good government within the county.

19.

The aforesaid deprivation of lawful taxes due Appling County places a greater tax burden upon those taxpayers who are required to pay taxes, including the individual plaintiffs and the other ad valorem taxpayers of the county. The actions of defendants shift the burden of their lawful taxes from themselves to the other taxpayers of Appling County.

20.

Said Act of 1975 creating said Authority provides, especially in Section 6 thereof, that the Authority is an institution of purely public charity performing an essential governmental function and all property of said Authority shall be considered to be public property and is declared to be for essential public and governmental purposes; and all of the property of the said Authority is declared to be non-taxable for any and all purposes by the State or any of its political subdivisions. Said Act also provides that the Authority may issue revenue bonds, and the income, obligations, and the interest on said bonds are declared to be non-taxable. (Section 6). Said Act also provides, especially in subparagraph (k) of Section 7 and in Section 8, that said revenue bonds shall be payable from the revenues, receipts and earnings of the projects of the Authority and other available funds thereof, the Authority to enter into one or more contracts with no less than five of the aforesaid political subdivisions owning and operating an electrical distribution system on the date the Act became law. Said political subdivisions are 47 in number, and are Crisp County and the following municipalities:

ADEL
ALBANY
BARNESVILLE
BLAKELY
BRINSON
BUFORD
CAIRO
CALHOUN
CAMILLA
CARTERSVILLE
COLLEGE PARK
COMMERCE
COVINGTON
DOERUN
DOUGLAS
EAST POINT
ELBERTON
ELLAVILLE
FAIRBURN
FITZGERALD
FORSYTH
FORT VALLEY
GRANTVILLE
GRIFFIN
HOGANSVILLE
JACKSON
LAFAYETTE
LA GRANGE
LAWRENCEVILLE
MANSFIELD
MARIETTA
MONROE
MONTICELLO

MOULTRIE
NEWNAN
NORCROSS
PALMETTO
QUITMAN
SANDERSVILLE
SYLVANIA
SYLVESTER
THOMASTON
THOMASVILLE
WASHINGTON
WEST POINT
WHIGHAM

21.

(a) The Authority entered into Power Contracts with each of the aforesaid political subdivisions in which each subdivision was referred to as a Participant. These contracts are substantially identical, and recite that the Authority will issue its Revenue Bonds pursuant to said Act of 1975, and they provide for payments to the Authority by Participants to pay the interest and maintain a sinking fund for the payment of the principal of said bonds; and that the Authority shall provide or cause to be provided, and each Participant shall take from the Authority the bulk power supply of Participant (Sec. 201). The contracts allot to each Participant a stated portion of the electrical power and energy to be received by the Authority from that generated at the aforesaid Plant Hatch (and other plants and works), and provide that each Participant shall pay the Authority for such allotment of electrical power and energy, whether or not the same is used by the Participant, this allotment being referred to as the Participant's Entitlement Share (Sec. 307). The obligations of the Participants under these contracts are full faith and credit obligations for the discharge of which all the taxable property within the territorial limits of the political subdivision is bound, and by them the revenue bonds are secured.

(b) By resolution of said Authority adopted August 30, 1976, it was determined to issue and sell Power Revenue Bonds aggregating one billion six hundred million dollars (and additional bonds), the principal and interest of the same to be paid from the revenues received from the aforesaid political subdivisions under and pursuant to said contracts.

(c) The Authority caused said bonds to be validated, and from an issue thereof sold by it obtained and delivered to Georgia Power Company the sum of $166,160,189.00 (this amount being alleged upon information and belief). The Authority received from Georgia Power Company: (i) General Warranty Deed and Bill of Sale from Georgia Power Company to Municipal Electric Authority of Georgia as of the 7th day of February, 1977, and recorded in Deed Book 173, page 186, Appling County Records; and (ii) General Assignment and Bill of Sale from Georgia Power Company to Municipal Electric Authority of Georgia as of February 7, 1977, and recorded in Deed Book 174, page 95, said Records.

Before receiving said $166,160,189.00 and before delivering to the Authority said General Warranty Deed and Bill of Sale and said General Assignment and Bill of Sale, but in contemplation of the transaction, the Authority and Georgia Power Company entered into contracts including the following:

(i) Purchase and Ownership Participation Agreement between Georgia Power Company and Municipal Electric Authority of Georgia, dated as of August 20, 1976, and (ii) Edwin I. Hatch Nuclear Plant Agreement of Construction between Georgia Power Company and Municipal Electric Authority of Georgia, dated as of August 27, 1976, and (iii) Edwin I. Hatch Nuclear Plant Operating Agreement between Georgia Power Company and Municipal Electric Authority of Georgia, dated as of August 27, 1976.

22.

By said General Warranty Deed and Bill of Sale, and said General Assignment and Bill of Sale, and said Purchase and Ownership Participation Agreement, and said Agreement of Construction, and said Operating Agreement (all as referred to in Paragraph 21 above), it is stated that Georgia Power Company conveys to Municipal Electric Authority of Georgia a 17.7% undivided interest in and to Plant Hatch, including the aforesaid two 807 MWe nominally-rated nuclear generating units known as the Edwin I. Hatch Nuclear Unit Nos. 1 and 2, and all properties appurtenant thereto and said railroad with its appurtenant properties, and all easements. It is further provided that the parties expressly waive and renounce for the term of the Operating Agreement between them any and all rights of any kind or nature whatsoever, legal or equitable, as a tenant-in-common in the property conveyed to partition and equitable accounting. The Authority irrevocably appoints the Power Company its agent in connection with Plant Hatch to act on its behalf in the planning, design, licensing, construction, acquisition, completion, maintenance, operating and disposal of Plant Hatch. The Power Company shall have sole authority to manage, control, maintain and operate Plant Hatch and shall take all steps which it deems necessary or appropriate for that purpose. The Authority irrevocably authorizes the Power Company to act as its agent in all activities in connection with the Authority's interest in Plant Hatch. As the sole manager and predominant owner of Plant Hatch, the Power Company will manage, control, maintain and operate Plant Hatch in all respects as if it were the sole owner of Plant Hatch. The Power Company shall be entitled to 82.3% of the net capacity and net output of Plant Hatch at any given time and the Authority shall be entitled to 17.7%; except that during the first eight years during the operation of Unit No. 1 the Power Company will be entitled to a declining fractional part of the Authority's capacity and energy therefrom in accordance with a stated schedule, a similar provision being made with respect to the first eight years of the commercial operation of Unit No. 2. The Power Company shall have the sole authority and responsibility to manage all Plant Hatch nuclear fuel according to its sole discretion and judgment. The Power Company and Authority shall be responsible for 82.3% and 17.7% respectively of operating costs of Plant Hatch, except as stated. Authorized representatives of the Authority will be permitted to visit and observe Plant Hatch but not in such a way as in the judgment of the Power Company will unreasonably interfere with safe and efficient operation. The Operating Agreement shall remain in effect with respect to Hatch Unit No. 1 until September 30, 2009 and with respect to Unit No. 2, until December 27, 2012. Upon termination the Power Company retains such powers as shall be necessary in connection with the disposition of the property included in Plant Hatch at the time of such termination and the rights and obligations of the Power Company and Authority shall continue with respect to any acts taken by it in connection with such disposition.

23.

It is pursuant to the transactions between said Authority and Georgia Power Company herein referred to, especially in Paragraphs 21 and 22 hereof, that it is contended that under the Act of 1975 said 17.7% interest is exempt from taxes, and thereby the return and payment of taxes is refused. But in truth and fact said exemption does not obtain as herein fully appears.

24.

Said Plant and works under the laws of Georgia constitutes tangible property for taxation. It is the law of Georgia that all tangible property shall be taxed alike. The lands, houses, livestock, farm equipment and buildings of the individual plaintiffs constitute tangible property for taxation under the laws of Georgia. The other ad valorem taxpayers of Appling County return and pay taxes upon their tangible property. The individual plaintiffs and other ad valorem taxpayers are taxed upon their tangible property, to-wit: said 17.7% of said Plant and works. Thus the individual plaintiffs and other ad valorem taxpayers of the county are taxed, while like property of defendants is exempt from taxation, under color of said Act of 1975, and by the action of the State of Georgia, through the instrumentality of said Authority. This constitutes discrimination against the individual plaintiffs and said other taxpayers, and a denial of the equal protection of the laws. Thereby an added burden of taxation is cast upon the individual plaintiffs, and said other ad valorem taxpayers, which is a denial of the equal protection of the laws. Such constitutes also deprivation of the due process of law.

25.

Said Authority was created by the Act of 1975 to furnish the aforesaid political subdivisions an adequate, dependable and economical source or sources and supply of bulk electrical power. It is governed and controlled by said 47 political subdivisions and operates solely for their benefit. The electrical power and energy acquired and received by the Authority from Plant Hatch is furnished at wholesale rates to said 47 political subdivisions pursuant to said Power Contracts, thus supplying them with a ready and low-priced supply of electric energy. Neither Appling County, nor the people of Appling County, its citizens or taxpayers, receive any benefit from said Authority or its operations. On the contrary, the taxpayers of Appling County are burdened by the aforesaid exemption of said 17.7%, removing from the taxable revenues of Appling County large sums annually, and placing an additional burden of taxation upon them. This burden is without benefit to Appling County, its taxpayers or people. The equal protection of the laws is thus denied the individual plaintiffs (and the other taxpayers) for the reason that the aforesaid additional burden of taxation is put upon the taxpayers of Appling County for the sole benefit of said 47 political subdivisions, their citizens and inhabitants. Thus there is deprivation of due process of law. There is confiscation of revenues from Appling County and its taxpayers and a diversion thereof to the use of said 47 political subdivisions. Appling County is by all the foregoing denied the equal protection of the laws and deprived of due process of law.

26.

The equal protection of the laws is denied in the following regard: by the Electric Membership Corporation Act as set out in Chapter 34B-1 of Title 34B of the Annotated Code of Georgia, electric membership corporations are authorized, and the Superior Courts empowered to create such corporations for the purpose of operating as non-profit organizations in furnishing electrical energy to persons in rural areas who are not receiving electrical service from any corporation subject to the jurisdiction of the Georgia Public Service Commission or from any municipal corporation. The functions and activities of such electrical membership corporations are similar to that of said Authority. Said electric membership corporations are not exempt from taxation and their tangible property is subject to taxation ad valorem as is other tangible property. By instruments entitled General Warranty Deed and Bill of Sale, recorded in Deed Book 163, p. 352, et seq., Appling County Records, General Warranty Deed and Bill of Sale recorded in Deed Book 165, p. 408, et seq., said Records, and General Assignment and Bill of Sale recorded in Deed Book 163, p. 345, et seq., said Records, Georgia Power Company conveyed to Oglethorpe Electric Membership Corporation, an electric membership corporation organized and operating under the law above referred to, what is described as a 30% undivided interest in said Edwin I. Hatch Plant and Nuclear Units Nos. 1 and 2, all appurtenances, said Railroad premises, easements and other properties. The provisions of the contracts between Georgia Power Company and Oglethorpe Electrical Membership Corporation with reference to said 30% interest are substantially identical with those obtaining between Georgia Power Company and said Authority. There is no substantial difference between the rights and interests of Oglethorpe Electrical Membership Corporation in reference to Plant Hatch and that of said Authority. Said 30% undivided interest of Oglethorpe Electrical Membership Corporation is not exempt from taxation, but ad valorem taxes are returned and paid thereon. To tax said 30% undivided interest of Oglethorpe and to except from taxation said 17.7% interest of said Authority is to discriminate in favor of said Authority and to deny equal protection of the laws. The result of such discrimination and denial of equal protection is to place an added burden of taxation upon the taxpayers of Appling County to the monetary loss of the individual plaintiffs and other taxpayers. It is as to the individual plaintiffs and other taxpayers a denial of equal protection and a deprivation of due process of law. Appling County is by all the foregoing denied the equal protection of the laws and deprived of due process of law.

27.

The equal protection of the laws is denied in the following regard: by the Act approved March 24, 1976, Georgia Laws 1976, pp. 639-640, it is provided that all real public property (with certain exceptions not here involved) which is owned by a political subdivision of this State and which is situated outside the territorial limits of the political subdivision is not exempt from ad valorem taxation. By instrument entitled General Warranty Deed and Bill of Sale recorded in Deed Book 179, page 457, et seq., Appling County Records, Georgia Power Company conveyed to City of Dalton what is described as a 2.2% undivided interest in Plant Hatch and said Nuclear Units Nos. 1 and 2, all appurtenances, the Railroad premises, and other properties. The provisions of the contracts between Georgia Power Company and City of Dalton with reference to said 2.2% interest are substantially identical with those obtaining between Georgia Power Company and said Authority. Said 2.2% undivided interest of the City of Dalton is not exempted from taxation but is subject to taxation ad valorem under the provisions of the above Act of 1976 in like manner as is other property. Said Plant Hatch is situated outside the territorial limits of the 47 political subdivisions governing and controlling and receiving the benefit thereof, in like manner as it is outside the territorial limits of the City of Dalton. To tax said 2.2% undivided interest of the City of Dalton and to exempt from taxation said 17.7% interest of said Authority is to discriminate in favor of said Authority and to deny equal protection of the laws. The result of such discrimination and denial of equal protection is to place an additional burden of taxation upon the taxpayers of Appling County to the monetary loss of the individual plaintiffs and other taxpayers. It is as to the individual plaintiffs and other taxpayers a denial of equal protection and a deprivation of due process of law. Appling County is by all the foregoing denied the equal protection of the laws and deprived of due process of law.

28.

The equal protection of the laws is denied in the following regard: Article 9, Section 8, Paragraph 1 of the Constitution of Georgia (Ga. Laws, 1976, at pp. 1323-1325), Revenue Anticipation Obligations may be issued by any county, municipal corporation or political subdivision of the State of Georgia to provide funds to buy, construct, extend, operate and maintain electrical generating and distribution systems together with all necessary appurtenances thereof. Such obligations shall be payable only from revenue produced by such facilities. If any such municipality, county or other political subdivision shall purchase, construct or operate such electric utility plant from the proceeds of such certificates and extend its services beyond the limits of the county in which the municipality or political subdivision is located, then its property located outside said county shall be subject to taxation as is that of privately owned and operated utilities. Said 17.7% interest in respect of Edwin I. Hatch Nuclear Plant was purchased by said Authority from Georgia Power Company exclusively from proceeds of tax exempt revenue bonds. The activities of said Authority are similar to those authorized by counties, municipal corporations and political subdivisions by the aforesaid portion of the Constitution of Georgia. The services of said Authority with reference to the electric energy obtained by it from Plant Hatch are all rendered outside Appling County and are for the benefit of the 47 political subdivisions governing and controlling the Authority. There is no reasonable basis for distinction between the operations of the Authority with reference to Edwin I. Hatch Nuclear Plant, and operations carried on by counties, municipal corporations, and political subdivisions pursuant to said provisions of the Constitution of Georgia. When such political subdivisions provide electricity beyond the limits of the county in which the political subdivision is located, the property located outside of said county is subject to taxation. Equal protection requires that the property of the Authority located outside of said county be subject to taxation. Equal protection requires that the property of the Authority located outside the said 47 political subdivisions be subject to taxation.

29.

The equal protection of the laws is denied in the following regard: the rights and interests of the Authority in respect of said 17.7% interest in no way diminish the tangible properties of Plant Hatch. Said 17.7% interest is indistinguishable. It is not capable of possession. The Authority has never had any portion of Plant Hatch in possession, and does not now have and cannot have any right of possession. The exclusive possession of Plant Hatch has been and is required to continue in Georgia Power Company. The actions of the Authority acting for the State of Georgia investing said 17.7%

interest with tax exemption is arbitrary; it is incapable of being sustained upon any factual basis. Plaintiff taxpayers are taxed upon their tangible property, but said 17.7% is exempt from taxation without factual basis. The result is to place an additional burden of taxation upon the individual plaintiffs and other taxpayers of Appling County and deprive them of the equal protection of the laws and due process of law. Appling County is by the foregoing denied equal protection of the laws and deprived of due process of law.

30.

No valid tax exemption can obtain in violation of the Constitution of the United States. To exempt from taxes said 17.7% interest under the facts would deny the equal protection of the laws and cause deprivation of due process of law in each of the respects set forth in Paragraphs 24, 25, 26, 27, 28 and 29. Such would be violative of Section 1 of the 14th Amendment of the Constitution of the United States wherein it is provided that no State shall deprive any person of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

That portion of said Act of the General Assembly of Georgia approved March 18, 1975 (Ga. Laws, 1975, p. 107), contained in Section 6 thereof, and providing: "*that the Authority is an institution of purely public charity performing an essential governmental function and all property of said Authority is hereby declared and shall in all respects be considered to be public property *and all of the property *of the Authority *shall be and hereby are declared to be non taxable for any and all purposes by the State or any of its political subdivisions"; as applied to the facts including the instruments referred to in Paragraph 21 hereof, is violative of the foregoing provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and therefore null, and without force and effect so far as it undertakes to exempt from taxation said 17.7% interest.

As no valid exception can exist in reference to said 17.7% interest it is the duty of defendants to return the same for taxation and especially to the State Revenue Commissioner pursuant to the laws referred to in Subsection (b) of Paragraph 8 hereof, and to cause ad valorem taxes to be paid thereon as tangible property. That is to say, it was the duty of Georgia Power Company, being in possession of the entirety of Plant Hatch and operating Plant Hatch in its electric light, power and hydro-electrical power business, to make return of the entirety of Plant Hatch, including said 17.7% interest; and it was the duty of said Authority claiming said 17.7% interest in Plant Hatch to return the same; and it is the duty of both defendants to cause taxes to be paid on said 17.7% interest.

Appling County, for the discharge of its public functions and services, is entitled to have the due process of law, including the aforesaid return. Said Authority, as an instrumentality of the State of Georgia acting pursuant to said Act of 1975, undertakes to deny to Appling County such due process, and Georgia Power Company, by the transactions between it and the Authority above referred to combines and confederates in that regard.

The individual plaintiffs as taxpayers, and the other ad valorem taxpayers of Appling County, are entitled to have such return and payment of taxes, and defendants' refusal thereof deprives them of due process of law and the equal protection of the laws.

31.

January 1, 1966, General Obligation Bonds of Appling County were issued for hospital purposes; the final maturity of these bonds is January 1, 1991; and there is now outstanding a principal balance of $271,-000.00. January 1, 1967, General Obligation Bonds of Appling County were issued for hospital purposes; these bonds have a final maturity of January 1, 1991; and there is now an outstanding principal balance of $105,000. January 1, 1966, General Obligation Bonds of Appling County were issued for courthouse purposes; the bonds have a final maturity of January 1, 1991; and there is now outstanding a principal balance of $101,000. January 1, 1974, General Obligation Bonds of Appling County were issued for school purposes for the Appling County school district; these bonds have a final maturity of January 1, 1995; and the principal outstanding balance is $1,513,000. These bonds are all now in the hands of purchasers who acquired the bonds in good faith, relying upon the contracts which resulted from the issuance and sale of the bonds, including the contract obligation which bound all the taxable property of Appling County for the payment of the principal and interest on said bonds according to the laws then of force. There is no independent school district in Appling County, and all the tangible property in Appling County, including Plant Hatch and its appurtenances, the Plant Hatch Railroad, and said 17.7% interest, is bound for the payment of the principal and interest of said bonds according to the tenor thereof. The actions of defendants whereby they undertake to exempt from taxation for the payment of said bonds the aforesaid 17.7% interest is in derrogation of the aforesaid contract. It is violative of the Constitution of the United States, Article I, Section X, providing that no State shall pass any law impairing the Obligation of Contracts, for the Authority acts as an instrumentality of the State of Georgia, pursuant to said Act of 1975 creating it, and Georgia Power Company confederates, combines and contracts to such unlawful end. So much of said Act of 1975, approved March 19, 1975 (Georgia Laws, 1975, p. 107) as in Section 6 thereof provides that "all of the property * of the Authority * are declared to be non taxable for any and all purposes by the State or any of its political subdivisions"; so far as the same applies to taxation for the payment of the principal and interest on said bonds according to the tenor thereof, is null and void as violative of said Article I, Sec. X, of the Constitution of the United States, for the reason that there would be an impairment of the Obligations of Contracts if tangible property in Appling County subject to taxation for the payment of said bonds were exempted from said taxation after their issuance and sale. As is heretofore alleged in Paragraph 17, the taxes produced for Appling County (based upon the 1977 millage) upon said 17.7% interest, would amount annually to $8,500.00 to pay the principal and interest and to provide a sinking fund for the two issues of hospital bonds and the issue of courthouse bonds; and $26,550.00 to pay the principal and interest and to provide a sinking fund for the aforesaid school bonds; the 1977 rate levied in these regards being sixteen one-hundredths mill for the hospital and courthouse bonds, and ½ mill for the school bonds. Defendants in removing and undertaking to remove said 17.7% interest from taxation for said bonds deny the individual plaintiffs and the other taxpayers of Appling County the equal protection of the laws, in that they impose upon them an added burden of taxation. Defendants thereby deprive Appling County of due process of law.

32.

Under the Constitution of Georgia as applied to the facts including the instruments hereinbefore referred to in Paragraph 21, no portion of Plant Hatch is or can be exempted from taxation, and said 17.7% interest is subject to taxation as part of the tangible property of Plant Hatch, its appurtenances, and Railroad. Under the Constitution of Georgia the General Assembly is authorized to exempt from taxation certain specified property; all other property is subject to taxation. Article 7, Section 1, Paragraph 4, provides: "The General Assembly may, by law, exempt from taxation all public property * all institutions of purely public charity*". (Georgia Laws, 1976, at p. 1269). By the Act of 1975 creating the Authority its property is declared exempt under these provisions. Plaintiffs aver, however, that said 17.7% interest does not constitute public property within the meaning of the Georgia Constitution. Plaintiffs aver that said 17.7% interest is not an institution of purely public charity nor is said Authority an institution of purely public charity, within the meaning of the Constitution of Georgia.

Said 17.7% interest is not public property; it is incapable of being taken into possession by the public or for the use or benefit of the public; it is not possessed by the Authority and cannot be possessed by the Authority; it is in the sole and exclusive possession of Georgia Power Company. It is incapable of providing electric power or discharging any public or governmental purpose; or promoting in any way the public general welfare, bettering the general condition of society residing in the State of Georgia, constituting a public beneficence for the good of humanity and for the general improvement and happiness of society (these being stated objectives of the Act of 1975 creating said Authority). Said 17.7% interest is indistinguishable. The rights and interests of the Authority in respect of said 17.7% interest in no way diminish the tangible properties of Plant Hatch, which at all times has been and is exclusively operated by Georgia Power Company as part of its electric power business. To denominate said 17.7% interest public property is arbitrary, without factual basis, and contrary to the provisions of the Constitution of Georgia referred to.

Under the facts herein set out, said Authority is not an institution of purely public charity within the meaning of the Constitution of Georgia; its functions, rights and interests in respect to said 17.7% interest exclude it from the charitable institutions which the Georgia Constitution authorizes the General Assembly to exempt from taxation. The Authority is not a charity; it is not a public charity; it is simply an instrument whereby electric power produced at Plant Hatch is sold in bulk to the aforesaid 47 political subdivisions; it serves no charitable purpose and engages in no charitable activities. To exempt said 17.7% interest from taxation upon the public charity provision of the Constitution is to violate the Constitution of Georgia and confer a tax exemption without factual foundation.

So much of said Act of 1975, approved March 18, 1975, (Georgia Laws, 175, p. 107), as in Section 6 thereof, declares:

"*that the Authority is an institution of purely public charity performing an essential governmental function and all property of said Authority is hereby declared and shall in all respects be considered to be public property*;" is, as applied to the facts here involved, repugnant to the aforestated provision of the Constitution of Georgia, for, said 17.7% interest is not in fact public property, and the mere designation of it by the General Assembly as public property cannot vest it with such significance contrary to facts. Likewise, said designation of the Authority by said Act as an institution of purely public charity is repugnant to the aforestated provision of the Constitution of Georgia for the reason that under the facts the Authority is not in the respects here involved an institution of purely public charity, and said designation by the General Assembly cannot make it such institution when the facts show otherwise. The Constitution of Georgia authorizes the General Assembly to exempt from taxation all public property, and all institutions of purely public charity, but whether the property is public property, or the institution one of purely public charity, is dependent upon the applicable facts, and the General Assembly may not arbitrarily make such designation without factual support. As said 17.7% interest is not public property, and as said Authority is not an institution of purely public charity in reference to said interest, under the facts here applicable, it is in derrogation of the Constitution of Georgia, Article 7, Section 1, Paragraph 4, above referred to, to accord exemption from taxation as is here undertaken.

33.

That the Board of Commissioners of Appling County may discharge the duty imposed upon it by law of annually fixing the rate of taxation (Georgia Code, Sec. 92-3801), which duty will be next discharged September, 1978, it is necessary that the tax base be ascertained, that is, that the Board have before it the tangible properties subject to ad valorem taxation, their fair market value, and their assessed values; for it is from the taxation of such tangible properties that the revenues are to be obtained whereby the government is to be maintained and public services provided. The larger the tax base the smaller will be the rate of taxation. If said 17.7% interest is to be exempted and removed from the tax base, the rate of taxation must be adjusted accordingly, for such exemption deprives the county of large sums annually. Thus Appling County is interested in the actual controversy between it and defendants as to whether said 17.7% interest in Plant Hatch shall be exempted from all taxation; and the individual plaintiffs as taxpayers (and all the other ad valorem taxpayers of Appling County) are interested therein, for by said exemption their tax burdens will be increased. Plaintiffs aver that they are entitled to have this Honorable Court declare the rights and legal relations of the parties hereto in respect of said claimed exemption from taxation.

WHEREFORE, Plaintiffs pray that the Court adjudge:

(1) That the entirety of Plant Hatch, its railroad, and all appurtenant properties, are subject to taxation as tangible property;

(2) That said 17.7% interest is not exempt from taxation;

(3) Or, if otherwise exempt, that same is not exempt from taxation for the payment of principal and interest on said bonds.

Plaintiffs further pray for such other and further necessary and proper relief as may be appropriate after the Court has entered Declaratory Judgment.

And, plaintiffs will ever pray.

IV.

MOTION TO DISMISS COMPLAINT FILED BY MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA, GROUNDS 1, 2, 3 AND 4 ONLY.

MOTION TO DISMISS COMPLAINT

Defendant, Municipal Electric Authority of Georgia, moves the court as follows:

1. To dismiss the action of the individual plaintiffs (Presley, Burke, Beecher, Weaver, Hollis and Thornton) on the ground that the Court lacks jurisdiction because the complaint fails to allege that each of said plaintiffs has in controversy the jurisdictional amount required by 28 USC 1331(a).

2. To dismiss the action of the county plaintiff (Appling County) on the ground that the Court lacks jurisdiction because the complaint alleges that all of the Federal questions upon which its alleged claims are founded are based upon the Contract Clause, Article 1, Section 10, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, and said plaintiff, a political subdivision, lacks standing to invoke either of such provisions against a legislative enactment of the state of its creation.

3. To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter because the complaint seeks a declaratory judgment respecting the administration of state tax law and therefore brings the action within the purview of 28 USC 1341 which limits the jurisdiction of the district courts with respect to such actions.

4. To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter because the complaint alleges no substantial Federal question.

V.

MOTION TO DISMISS FILED BY GEORGIA POWER COMPANY, ADDRESS TO THE COURT AND GROUND 1 ONLY.

MOTION TO DISMISS

COMES NOW DEFENDANT, GEORGIA POWER COMPANY (hereinafter termed "Georgia Power"), and moves that the Complaint be dismissed pursuant to Rule 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure for failing to state a claim for which relief can be granted and for failing to state a claim within the subject matter jurisdiction of this Court. In support of its Motion, Georgia Power shows the Court the following:

1.

This Court lacks jurisdiction over the subject matter of Plaintiffs' Complaint because the federal questions allegedly presented by it are only raised in anticipation of expected defenses based on State law. Accordingly, because Plaintiff's Complaint does not arise under federal law, it should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

VI.

FIRST AMENDMENT OF PLAINTIFFS AND ORDER ALLOWING SAME.

FIRST AMENDMENT OF PLAINTIFFS

And now come said plaintiffs, and with leave of Court, amend their complaint by adding thereto an additional paragraph to be known as paragraph 1a, as follows, to-wit:

1a.

This action also arises under *Title 42, Sec. 1983*, of the United States Code, providing: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

The jurisdiction of the Court therefore obtains under Section 1331 of 28 United States Code; and also under Section 1343 thereof.

ORDER OF COURT

The foregoing amendment is allowed by the Court, subject to objection, and is ordered filed.

This 12th day of December, 1978.

/s/ Anthony A. Alaimo
United States Judge

VII.

GEORGIA COUNTIES, THEIR STATUS, AND THEIR TAXING POWERS

The Constitution of Georgia of 1976, Art. 9, Sec. 1, Par. 1, Georgia Laws 1976 at p. 1303, Code Ann., Sec. 2-5801, provides: "Counties a Corporate Body; Boundaries. Each county shall be a body corporate with such powers and limitations as are provided in this Constitution and as prescribed by law. All suits by or against a county shall be in the name thereof; and the metes and bounds of the several counties shall remain as now prescribed by law, unless changed as hereinafter provided."

Art. 9, Sec. 1, Par. 2, Georgia Laws 1976 at p. 1303, Code Ann., Sec. 2-5802, provides: "Number Limited. There shall not be more than one hundred and fifty-nine counties in this State."

Art. 9, Sec. 1, Par. 3, Georgia Laws 1976 at p. 1303, Code Ann., Sec. 2-5803, provides: "New Counties Permitted. When. No new county shall be created except by the consolidation or merger of existing counties."

Art. 9, Sec. 1, Par. 4, Georgia Laws 1976 at p. 1303, Code Ann., Sec. 2-5804, provides: "County Lines. County lines shall not be changed, unless under the operation of a general law for that purpose."

Art. 9, Sec. 5, Pars. 1 & 2, Georgia Laws 1976 at pp. 1314, 1315, 1316, Code Ann., Secs. 2-6201, 6202, provides: "SECTION V. COUNTY GOVERNMENT; TAXATION POWER. Paragraph I. Power of County Government. The General Assembly may authorize any county to exercise the power of taxation for any public purpose as authorized by general law or by this Constitution, and unless otherwise provided by this Constitution or by law, no levy need state the particular purposes for which the same was made nor shall any taxes collected be allocated for any particular purpose, unless expressly so provided by the General Assembly or this Constitution.

"Paragraph II. Purposes of Taxation. In addition such other powers and authority as may be conferred upon any county by this Constitution or by the General Assembly, counties are hereby authorized to exercise the power of taxation for the following purposes which are hereby declared to be public purposes, and expend funds raised by the exercise of said powers for said purposes and such other public purposes as may be authorized by the General Assembly:

1. Pay the expenses of administration of the county government.

2. Acquire, construct, maintain, improve, or aid in the acquisition, construction, maintenance, or improvement of public buildings, bridges, parks, recreation areas and facilities, libraries, streets, sidewalks, roads, airports, docks, facilities for mass transit system for the transportation of passengers for hire, and other properties for public use; and to acquire any real property or any interest therein in connection with the foregoing.

3. Provide for the operation of the courts, the maintenance and support of prisoners, and the handling of litigation affecting the county.

4. Establish and conduct public health and sanitation programs and provide for the collection and preservation of records and vital statistics.

5. Establish and maintain a county police department.

6. Provide medical or other care and hospitalization for the indigent sick and to support paupers.

7. Pay county agricultural and home demonstration agents and conduct programs utilizing the services of such agents.

8. Establish and conduct programs of welfare benefits and public assistance as may be provided by law.

9. Provide fire protection for forest lands and conserve natural resources.

10. Provide insurance, retirement and pension benefits, coverage under Federal Old Age and Survivors' Insurance programs, hospitalization benefits, and workmen's compensation benefits for its officers and employees, their dependents and survivors, and for public school teachers and personnel, their dependents and survivors: Provided that all such payments for public school teachers and personnel, their dependents and survivors, shall be paid from education funds.

11. Establish and maintain a recreation system.

12. To provide for paying the principal and interest of any debt of the county and to provide a sinking fund therefor.

13. To provide for reasonable reserves for public improvements as may be fixed by law.

14. To provide for the support and maintenance of public schools, public education, and activities necessary and incidental thereto, including school lunches, as provided in Article VIII of this Constitution, upon the assessed value of all taxable property within the county, exclusive of any independent school system therein.

The grant of powers to counties contained in this Paragraph and in Paragraph IV of this Section shall not operate to prohibit the General Assembly from enacting general laws relative to the above subject matters or to prohibit the General Assembly by general law from regulating, restricting or limiting the exercise of such powers, except that the authority of the General Assembly provided herein shall not be construed to authorize the General Assembly to affect or modify the authority and duty of the governing authorities of counties to levy the tax provided for by subparagraph 14 above. The General Assembly shall act upon the above subject matters only by general law. The General Assembly shall not have the authority to withdraw any such powers. If population is used as a basis for classification for the applicability of any Act to any political subdivision or subdivisions of this State on the above subject matters, the Act shall apply only to political subdivisions of less than a specified population or shall apply to political subdivisions of more than a specified population.

Art. 9, Sec. 4, Par. 2, Georgia Laws 1976 at pp. 1311 through 1313, Code Ann., Sec. 2-6102, provides in part as follows: "Paragraph II, Supplementary Powers. In addition to and supplementary of any powers now conferred upon and possessed by any county, municipality, or any combination thereof, any county, any municipality and any combination of any such political subdivisions may exercise the following powers and provide the following services;

(1) Police and fire protection.

(2) Garbage and solid waste collection and disposal.

(3) Public health facilities and services; including hospitals, ambulance, emergency rescue services, and animal control.

(4) Street and road construction and maintenance; including curbs, sidewalks, street lights and devices to control the flow of traffic on streets and roads constructed by counties and municipalities or any combination thereof.

(5) Parks, recreational areas, programs and facilities.

(6) Storm water and sewage collection and disposal systems.

(7) Development, storage, treatment and purification and distribution of water.

(8) Public housing.

(9) Urban redevelopment programs.

(10) Public transportation system.

(11) Libraries.

(12) Terminal and dock facilities and parking facilities.

(13) Building, housing, plumbing and electrical codes.

(14) Air Pollution Control.

(15) Planning and zoning, which is the power to provide within their respective jurisdictions for the zoning or districting of such political subdivisions for various uses and other or different uses prohibited in such zones or districts; to regulate the use for which said zones or districts may be set apart; and to regulate the plans for development and improvement on real estate therein.

"Except as otherwise provided in this paragraph as to planning and zoning, nothing contained within this Paragraph shall operate to prohibit the General

Assembly from enacting general laws relative to the above subject matters or to prohibit the General Assembly by general law from regulating, restricting or limiting the exercise of the above powers, but, the General Assembly shall not have the authority to withdraw any such powers. The General Assembly shall act upon the above subject matters only by general law. If population is used as a basis for classification for the applicability of any Act to any political subdivision or subdivisions of this State on the above subject matters, the Act shall apply only to political subdivisions of less than a specified population or shall apply to political subdivisions of more than a specified population. The General Assembly shall not, in any manner, regulate, restrict or limit the power and authority of any county, municipality, or any combination thereof, to plan and zone as herein defined.

Provided, however, that no City or County may exercise any such powers or provide any such service herein listed inside the boundaries of any other local governments except by contract with the City or County affected unless otherwise provided by any local or special law and no existing local or special laws or provision of this Constitution is intended to be hereby repealed.

Georgia Code Ann., Sec. 92-3701, provides: "Purposes of county tax in general. County taxes may be levied and collected for the following purposes:

1. To pay the expenses of administration of the county government.

2. To pay the principal and interest of any debt of the county and to provide a sinking fund therefor.

3. For educational purposes upon property located outside of independent school systems, as provided in Article VIII (section 2-6401 et seq.) of the Constitution of Georgia, as amended.

4. To build and repair the public buildings and bridges.

5. To pay the expenses of courts, the maintenance and support of prisoners and to pay sheriffs and coroners for litigation.

6. To build and maintain a system of county roads.

7. For public health purposes in said county, and for the collection and preservation of records of vital statistics.

8. To pay county police.

9. To support paupers.

10. To pay county agricultural and home demonstration agents.

11. To provide for payment of old-age assistance to aged persons in need, and for the payment of assistance to needy blind, and to dependent children and other welfare benefits, provided that no person shall be entitled to such assistance who does not qualify for such assistance in every respect, in accordance with enactments of the General Assembly which may be in force and effect prescribing the qualifications for beneficiaries hereunder; provided no indebtedness or liability against the county shall ever be created for the purpose herein stated, in excess of the taxes lawfully levied each fiscal year under Acts of the General Assembly authorized under the Constitution of Georgia as amended for such purposes.

12. To provide for fire protection of forest lands and for the further conservation of natural resources.

13. To provide medical or other care, and hospitalization, for the indigent sick people of the county.

14. To acquire, improve and maintain airports, public parks, and public libraries.

15. To provide for workmen's compensation and retirement or pension funds for officers and employees.

16. To provide reasonable reserves for public improvements as may be fixed by law.

17. To pay pensions and other benefits and costs under a teacher retirement system or systems.

18. For school lunch purposes, upon property located outside of independent school systems as provided in Article VIII (section 2-6401 et seq.) of the Constitution of Georgia, as amended, to provide for payment of costs and expenses incurred in the purchases, replacement and maintenance of school lunchroom equipment, storage and preparation of foods, and all other costs and expenses incurred in the operation of school lunch programs, but excluding purchase of foods.

19. In addition to the purposes enumerated in this section counties may levy and collect taxes for the purpose of providing ambulance services within their respective counties. Ambulance services provided by any county is hereby declared to be a public purpose.

(Acts 1946, p. 87; 1958, p. 370; 1962, pp. 458, 459; 1970, p. 582.)

Georgia Code Ann., Sec. 92-3702, provides: "The ordinary or other county authority empowered to levy taxes is hereby authorized to levy a tax not exceeding five mills to pay current expenses or accumulated debts of the county, or both, without a recommendation by the grand jury."

Georgia Code Ann., Sec. 92-3706, provides: "The ordinary or other county authority empowered to levy taxes is hereby authorized to levy a tax for county pur-

poses over and above other taxes authorized by law, not to exceed two and one-half mills, provided two-thirds of the grand jury at the first or spring term recommend such tax."
(Act 1821, Cobb, 184. Act 1937, p. 444.)

VIII.

GEORGIA CONSTITUTION AND IMPLEMENTING STATUTE AS TO EXEMPTION FROM TAXATION

The Constitution of Georgia of 1976, Art. 7, Sec. 1, Par. 4, Georgia Laws 1976 at pages 1269, 1270, Code Ann., Sec. 2-4604, provides in part: "The General Assembly may, by law, exempt from taxation all public property.* All institutions of purely public charity.*"

Art. 7, Sec. 1, Par. 4, Georgia Laws 1976 at pp. 1269, 1270, Code Ann., Sec. 2-4604, concludes: "All laws exempting property from taxation, other than the property herein enumerated, shall be void."

Georgia Code Ann., Sec. 92-201, provides in part: "The following described property shall be exempt from taxation, to wit: all public property*. All institutions of purely public charity.*" This Section is taken from the Act approved January 31, 1946 (Georgia Laws 1946, p. 12, as amended).

Said Act of 1946 was amended by the *Act approved March 24, 1976, Georgia Laws 1976, p. 639,* which provides in part: "*all public real property which is owned by a political subdivision of this State and which is situated outside the territorial limits of the political subdivision shall not be exempt from ad valorem taxation.*"

IX.

EXCERPTS FROM THE MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA ACT

The Act creating Municipal Electric Authority of Georgia, being the *Act approved March 18, 1975, Georgia Laws 1975 pp. 107-147,* provides in part: "Section I, Declaration of Need. Whereas, certain political subdivisions of the State of Georgia, now own and operate electric distribution systems to serve their citizens, inhabitants, and customers by providing them electricity for all purposes, and

"Whereas, if such political subdivisions are to furnish, and if the members of the public in the areas they serve are to receive adequate service, such political subdivisions must have an adequate, dependable, and economical source or sources and supply of bulk electric power.

"Now, therefore, it is hereby declared that there exists in the State of Georgia a need for an Authority to function without profit in developing and promoting for the public good in this State an adequate, dependable, and economical source or sources and supply of bulk electric power and energy for the purposes aforesaid."

"Section 2. Creation of the Authority. There is hereby created a public body corporate and politic to be known as the Municipal Electric Authority of Georgia, which shall be a public corporation of the State of Georgia, and shall have perpetual existence. Said Authority, however, shall not be a State institution nor a department or agency of the State, but shall be a political subdivision of the State, a mere creature of the State, having distinct corporate entity*." (Section 2 was amended by *Georgia Laws 1975, p. 1200,* whereby the words "a political subdivision" were stricken and "an instrumentality" substituted.)

"Section 3. Purpose. The purpose of the Authority shall be to acquire or construct, or to acquire and construct, and operate and maintain or cause to be constructed, operated, and maintained electric generation and transmission facilities, and to take all other necessary or desirable action, in order to provide or make available an adequate, dependable, and economic supply of electric power and energy and related services for such of said political subdivisions of the State of

Georgia as are hereinafter identified in section 27, as may desire the same and, incidentally and so as to take advantage of economics of scale in the generation and transmission of electric power and energy, to other persons and entities."

Section 4 provides in part: "The Authority shall consist of 9 members who shall be eligible to succeed themselves and who shall be elected by the duly designated representatives of those political subdivisions of the State of Georgia, which are authorized and directed to designate a member of the election committee.* (Meaning political subdivisions declaring intention to contract with the Authority for the purchase of electric power and energy.) Each member shall be a resident of one of said political subdivisions.*"

"Section 6. Public Property: It is hereby found, determined, and declared that the creation of the Authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of this State and that the Authority is an institution of purely public charity performing an essential governmental function and all property of said Authority is hereby declared and shall in all respects be considered to be public property and title to such property shall be held by the Authority only for the benefit of the public and the use of such property pursuant to the terms of this Act shall be and is hereby declared to be for essential public and governmental purposes, that is, for the promotion of public general welfare in the matter of providing an adequate, dependable, and economic electric power supply in an effort to better the general condition of society residing in the State of Georgia, which promotion is hereby declared to be a public beneficence for the good of humanity and for the general improvement and happiness of society, and all of the property of and income, obligations, and interest on the bonds and notes of the Authority and the transfer thereof shall be and hereby are declared to be non-taxable for any and all purposes by the State or any of its political subdivisions."

Section 7, subsection (c) authorizes the acquisition of property by purchase or eminent domain.

Section 7 relates to the powers of the Authority, and subsection (k) provides: "To issue its revenue bonds as hereinafter provided in evidence of its indebtedness incurred with respect to the powers above described payable from the revenues, receipts, and earnings of the projects of the Authority and other available funds thereof, to execute trust agreements or indentures; to sell, convey, pledge, and assign any and all of its funds, assets, property, and income as security for the payment of such revenue bonds and to provide for the payment of the same and for the rights of the owners thereof."

Section 8, subsection (a) entitled Issuance of Revenue Bonds, provides: "Security for Bonds. When the

Authority shall desire to issue revenue bonds as permitted by this Act, the Authority shall, prior to the adoption of a resolution authorizing the issuance of such bonds, enter into one or more contracts with no less than five political subdivisions which are authorized to contract with the Authority in accordance with the provisions of section 27, of this Act. All such contract or contracts shall be in accordance with the provisions of section 17, hereof."

Section 17 provides in part: "Contracts for Use of Projects. Said Authority may contract with any political subdivision of this State which is authorized by the provisions of section 27, of this Act, to make such contracts for the payment of such rates, tolls, fees, and charges, as may be prescribed by the Authority for the use by such subdivisions or the residents thereof of the services and facilities of the project or projects and facilities of the Authority, and any such political subdivision shall have and hereby is given the right and power by resolution of its governing body, to make such contract, and the amounts contracted to be paid by such political subdivisions to the Authority under such contract or contracts entered into pursuant to the provisions of this Act shall constitute general obligations of such political subdivision for the payment of which the full faith and credit of such political subdivision may be pledged to provide the funds required to *fulfill all* obligations arising under any such contract. Any such political subdivision which shall have entered into such a contract pursuant to the provisions of this Act shall annually in each and every fiscal year during the term of such contract include in a general revenue or appropriation measure, whether or not any other items are included, sums sufficient to satisfy the payments required to be made in each year by such contract until all payments required under such contract have been paid in full. In the event for any reason any such provision or appropriation is not made, then the fiscal officers of such political subdivision are hereby authorized and directed to set up as an appropriation on their accounts in each fiscal year the amounts required to pay the obligations called for under any such contract. The amount of the appropriation in each fiscal year to meet the obligations of such contract as authorized and required hereby shall be due and payable and shall be expended for the purpose of paying and meeting the obligations provided under the terms and conditions of such contract, and such appropriation shall have the same legal status as if the contracting political subdivision had included the amount of the appropriation in its general revenue or appropriation measure. Such fiscal officers shall make such payment to the Authority if for any reason such appropriation is not otherwise made, and any such political subdivision may obligate itself and its successors to use only such project and none other."

"Section 27. Political Subdivisions. Political subdivisions with which the Authority shall be authorized to contract, pursuant to the provisions of this Act to provide an electric power supply, shall be those political subdivisions of the State of Georgia which, on the date on which this Act becomes law, own and operate an electric distribution system."

X.

EXCERPTS FROM THE GEORGIA STATUTES RELATING TO ELECTRIC MEMBERSHIP CORPORATIONS

Title 34B of the Georgia Code Ann., Ch. 34B-1, relates to Electric Membership Corporations.

Sec. 34B-103, is in part as follows: "Purpose of Chapter. Cooperative, nonprofit, membership corporations may be organized under this Chapter for the purpose of engaging in rural electrification by any one or more of the following methods:

(1) The furnishing of electric energy to persons in rural areas who are not receiving electric service from any corporation subject to the jurisdiction of the Georgia Public Service Commission, or from any municipal corporation."

Sec. 34B-104 provides in part that each corporation shall have power: "To generate, manufacture, purchase, acquire and accumulate electric energy and to transmit, distribute, sell, furnish and dispose of such electric energy to its members, and to construct, erect, purchase, lease as lessee and in any manner acquire, own, hold, maintain, operate, sell, dispose of, lease as lessor, exchange and mortgage plants, buildings, works, machinery, supplies, equipment, apparatus, and transmission and distribution lines or systems necessary, convenient or useful."

Sec. 34B-115 provides: "Nonprofit operation. Each corporation shall be operated without profit to its members, but the rates, fees, rents or other charges for electric energy and any other facilities, supplies, equipment or services furnished by the corporation shall be sufficient at all times:

"(1) To pay all operating and maintenance expenses necessary or desirable for the prudent conduct of its business and the principal of and interest on the obligations issued or assumed by the corporation in the performance of the purpose for which it was organized, and

"(2) For the creation of reserves."

(Acts 1937, pp. 644, 653.)

Sec. 34B-117(1) provides: "Contributions to municipalities where service areas annexed. Each cooperative serving members within an area that has been annexed to and included in the corporate limits of a municipality shall contribute to such municipality annually, within 30 days following each calendar year, effective for the year 1960 and thereafter, an amount comparable to and proportionate to, but not more than the amount paid by privately owned electric utilities operating in or contiguous to such municipality. Such amount shall be computed on the same percentage basis as privately owned electric utilities and shall be based upon the sale of electric energy made by the cooperative to its members in the affected area of said municipality for all domestic and small commercial loads of less than 50 K.W." (Acts 1960, pp. 5, 6.)

Sec. 34B-131 provides: "Corporations are not subject to Public Service Commission. Corporations organized under this Chapter shall not be deemed to be subject to the jurisdiction and control of the Public Service Commission of this State." (Acts 1937, pp. 644, 557.)

XI.

EXCERPTS FROM GEORGIA CONSTITUTION RELATING TO CONSTRUCTION AND OPERATION OF ELECTRIC GENERATING AND DISTRIBUTION SYSTEMS BY POLITICAL SUBDIVISIONS FROM PROCEEDS OF REVENUE CERTIFICATES AND THE TAXATION OF PROPERTY THEREOF LOCATED OUTSIDE THE COUNTY

The Constitution of Georgia of 1976, Art. 9, Sec. 8, Par. 1, Georgia Laws 1976 at pages 1323-1325, Code Ann., Sec. 2-6501, provides in part: "Paragraph I. Revenue Anticipation Obligations. Revenue anticipation obligations may be issued by any county, municipal corporation or political subdivision of this State, to provide funds for the purchase or construction, in whole or in part, of any revenue-producing facility which such county, municipal corporation or political subdivision is authorized by the Act of the General Assembly approved March 31, 1937, known as 'The Revenue Certificate Laws of 1937,' as amended by the Act approved March 14, 1939, to construct and operate, or to provide funds to extend, repair or improve any such existing facility, and to buy, construct, extend, operate and maintain gas or electric generating and distribution systems together with all necessary appurtenances thereof. Such revenue anticipation obligations shall be payable, as to principal and interest, only from revenue produced by revenue-producing facilities of the issuing political subdivisions, and shall not be deemed debts of, or to create debts against, the issuing political subdivisions within the meaning of this paragraph or any other of this Constitution. This authority shall apply only to revenue anticipation obligations issued to provide funds for the purchase, construction, extension, repair or improvement of such facilities and undertakings as are specifically authorized and enumerated by said Act of 1937, as amended by said Act of 1939; and to buy, construct, extend, operate and maintain gas or electric generating and distribution systems, together with all necessary appurtenances thereof; provided further any revenue certificates issued to buy, construct, extend, operate and maintain gas or electric generating and distribution systems shall, before being undertaken, be authorized by a majority of those voting at an election held for the purpose in the county, municipal corporation or political subdivision affected, and provided further that a majority of the registered voters of such county, municipal corporation or political subdivision affected shall vote in said election, the election for such to be held in the same manner as is used in issuing bonds of such county, municipal corporation or political subdivision and the said elections shall be called and provided for by officers in charge of the fiscal affairs of said county, municipal corporation or political subdivision affected; and no such issuing political subdivision of the State shall exercise the power of taxation for the purpose of paying the principal or interest of any such revenue anticipation obligations or any part thereof.

"Provided that after a favorable election has been held as set forth above, if municipalities, counties or other political subdivisions shall purchase, construct, or operate such electric or gas utility plants from the proceeds of said revenue certificates, and extend their services beyond the limits of the county in which the municipality or political subdivision is located, then its services rendered and property located outside said county shall be subject to taxation and regulation as are privately owned and operated utilities."

XII.

THE PROVISIONS OF THE GEORGIA CONSTITUTION AS TO UNIFORMITY OF TAXATION, CLASSIFICATION OF PROPERTY, AND RETURNS BY PUBLIC UTILITIES

Art. 7, Sec. 1, Par. 3, of the Georgia Constitution of 1976, Code Ann., Sec. 2-4603, provides: "Uniformity; classification of property. All taxes shall be levied and collected under general laws and for public purposes only. All taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Classes of subjects for taxation of property shall consist of tangible property and one of more classes of intangible personal property including money. The General Assembly shall have the power to classify property including money for taxation, and to adopt different rates and different methods for different classes of such property.

"Notwithstanding anything to the contrary contained in this paragraph, the General Assembly shall be authorized to enact legislation treating any and all motor vehicles, including trailers, as a separate class from other classes of tangible property for ad valorem property tax purposes, and to adopt different rates, methods or assessment dates for the taxation of such property, and to enact legislation consistent herewith to prevent any person, firm or corporation from escaping payment of their fair share of ad valorem taxes on said motor vehicles.

"Notwithstanding anything to the contrary contained in this paragraph, the General Assembly shall be authorized to enact legislation treating any and all mobile homes, other than those mobile homes which qualify the owner thereof for the homestead property tax exemption under Georgia law, as a separate class of property from other classes of tangible property for ad valorem tax purposes, and to adopt different rates, methods of assessment dates for the taxation of such property and to enact legislation consistent herewith to prevent any person, firm or corporation from escaping payment of their fair share of ad valorem taxes on said mobile homes.

"The General Assembly may provide for a different method and time of returns, assessments, payment and collection of ad valorem taxes, of public utilities, but not a greater basis of value or at a higher rate of taxation than other properties."

XIII.

GEORGIA STATUTES AS TO RETURNS BY PUBLIC UTILITIES

Code Ann., Sec. 92-5901, is as follows: "Time for making returns. The returns of all companies mentioned in the following section, and agents of such foreign companies, authorized to do business in this State, shall be made to the State Revenue Commissioner by the first day of March in each year, as of January 1, preceding."

Code Ann., Supp., Sec. 92-5902, is as follows: "Returns by public utilities made to whom. All railroad companies, street and suburban railroads, or sleeping car companies, or persons or companies operating railroads or street railroads or suburban railroads or sleeping cars in this State, all express companies, including railroad companies doing express, telephone, or telegraph business (except small telephone companies, or persons doing a telephone business, whose capital stock or property is of less value than $5,000), all gas, electric light or power, hydroelectric power, steam heat, refrigerated air, dockage or cranage, canal, toll road, toll bridge, railroad equipment, or navigation business, through their president, general manager, owner, or agent having control of the company's offices in this State, shall be required to make annual tax returns of all property of said company located in this State to the State Revenue Commissioner; and the laws now in force providing for the taxation of railroads in this State, shall be applicable to the assessment of taxes from said businesses as above stated. (Acts 1927, p. 97; 1935, p. 64; 1976, pp. 190, 191, eff. for all tax years beginning on or after *January 1, 1976.*)"

Code Ann. Sec. 92-5903 is as follows: "Returns made how. The returns of all companies or persons which are required to be made to the State Revenue Commissioner shall be in writing and sworn to by the president or other executive officer, or by the agent of a foreign company, to be a just, true, and full return of the capital stock, net annual profits, or gross receipts, or business, or income, gross, annual, net, or any other kind, or other property or effects, for which said company is subject to taxation by the laws of this State.

"Each taxpayer required to return his property to the State Revenue Commissioner for taxation shall under rules and regulations promulgated by the State Revenue Commissioner apportion the value of its various properties to this State, if the taxpayer owns property in States other than Georgia, and between the several tax jurisdictions in this State. In promulgating the regulations specifying the method of apportionment, the State Revenue Commissioner shall consider the location of the various classes of property, the gross or net investment therein or any other factor reflecting the company's investment in property, pertinent business factors reflecting the utility of the property, pertinent mileage factors, and any other factors which in his judgment are reasonably calculated to fairly and equitably apportion the property between the various tax jurisdictions. As used in this section, the term 'pertinent business factors' means data that reflects the use of the company's property, such as gross revenue, net income, tons of freight carried, revenue ton miles, passenger miles, car miles, and comparable data. The term 'pertinent mileage factors' means factual information as to the linear miles of the company's track, wire, lines, pipes, routes, and similar operational routes and factual information as to the miles traveled by the company's rolling stock: Provided, that any reasonable value directly attributable to property physically located in one Georgia jurisdiction shall not be apportioned to any other Georgia jurisdiction. (Acts 1972, p. 119.)"

Code Ann., Sec. 92-2701, is as follows: "Railroads to report to State Revenue Commissioner annually. On or before the first day of March each railroad company in this State shall make an annual return as of January first preceding to the State Revenue Commissioner for the purposes of county taxation in each of the counties through which said road runs, in the following manner. Said return shall be under the oath of the president or other chief executive officer, and shall show the following facts as they existed on the first day of January preceding, to wit: first, the aggregate value of the whole property of said railroad company; second, the value of the real estate and track-bed of said company; third, the value of the rolling stock and all other personal property of said company; fourth, the value of the company's property in each county through which it runs. (Acts 1889, p. 29: Const. (1877), Art. VII, Sec. II, Par. VI, §2-5007.)"

Code Ann., Sec. 92-2702, is as follows: "Taxation of each county through which railroad passes. Whenever the amount of the tax levy of any county through which the said railroad runs is assessed by the authority of such county, the ordinary or other authority having charge of county affairs shall certify the same and transmit the certificate to the State Revenue Commissioner; and the property of such railroad company shall be subject to taxation in each county through which the road passes, to the same extent and in the same manner that all other property is taxed, in the manner hereafter set out. (Acts 1839, p. 29.)"

Code Ann., Sec. 92-2703, is as follows: "Property assessed. Whenever such certificate is received by the State Revenue Commissioner, he shall proceed to assess the amount of each railroad company's property, in each of said counties, in the following manner: First, it shall be assessed upon the property located in each county, upon the basis of the value given by the returns. Second, the amount of tax to be assessed upon the rolling stock and other personal property is as follows: As the value of the property located in the particular county is to the value of the whole property, real and personal, of the said company, such shall be the amount of rolling stock and other personal property to be distributed for taxing purposes to such county. The value of the property located in the county and the share of the rolling stock and personal property thus ascertained, and apportioned to each of such counties, shall be the amount to be taxed to the extent of the assessment in each county. (Acts 1889, p. 29.)"

Code Ann., Sec. 92-2704, is as follows: "Taxes due county paid tax collector. Whenever the State Revenue Commissioner shall ascertain and levy in the manner specified the amount of tax due by such company to each of such counties, it shall be his duty at once to notify the president and treasurer of such railroad company of the amount due in each of said counties for county taxes of said railroads, and each and every road is required, on or before December 20th in each year, to pay to the tax collector of each county through which the railroad runs the amount stated by the State Revenue Commissioner as the tax due to such county. (Acts 1889, p. 29; 1917, p. 197.)"

XIV.

GEORGIA STATUTES AS TO RETURNS AT FAIR MARKET VALUE AND ASSESSMENT AT 40 PERCENT THEREOF

Code Ann., Sec. 92-5701, provides as follows: "Property to be returned at its value. All property shall be returned for taxation at its fair market value. Promissory notes, accounts, judgments, mortgages, liens of all kinds; and all choses in action shall be returned at their value whether the debtors are solvent or partially solvent. (Acts 1909, p. 7272.)"

Code Ann., Supp., 92-5703, provides: "Tax to be levied by whom. All tangible property subject to taxation by the State, any county, or any other taxing jurisdiction shall be returned by the taxpayers as provided by law at its fair market value, and shall be assessed at 40 per cent of said fair market value, and taxed according to said 40 per cent of its fair market value on a levy made by each respective taxing jurisdiction. The levy for State taxation shall be made by Governor with the assistance of the State Revenue Commissioner.

"It is the intent and purpose of the General Assembly of this State that the value of tangible property as referred to in the tax laws of this State shall be 40 per cent of the fair market value of such property. The requirement contained herein that all municipal corporations assess at 40 per cent of fair market value shall not apply to any municipal corporation whose ratio of assessed value to fair market value exceed 40 per cent for the tax year 1971: Provided, however, that any municipal corporation so exempted shall in no event assess at a ratio less than 40 per cent.

"The notice of ad valorem taxes due sent to taxpayers of counties and municipalities shall include thereon both the fair market value of the property of the taxpayer subject to taxation and the assessed value thereof after being reduced as provided by this section. (Acts 1851-2, p. 291; 1909, p. 37; 1968, pp. 358, 359; 1972, p. 1102; 1975, p. 1083; 1976, p. 518, eff. March 18, 1976.)"

XV.

BANK OF TUPELO V. COLLIER, 191 GA. 852 AT PP. 855-858, BEING DIVISION 2 OF THE OPINION AND RELATING TO GEORGIA LAW THAT WHEN PROPERTY IS OWNED BY TENANTS IN COMMON THE JOINT PROPERTY IS LIABLE FOR ALL THE TAXES.

2. The next challenge to the execution is based on the ground that the security deed outstanding at the time of the decree is superior to the special lien decreed thereby, and therefore that the land could not be sold thereunder without first paying off the secured debt. *Cecil v. Gazan,* 65 Ga. 689; *Kidd v. Kidd,* 158 Ga. 546 (124 S.E. 45); *Roach v. Terry,* 164 Ga. 421 (138 S.E. 902). This presents the question of whether or not the lien of a tenant in common who has paid a cotenant's share of the taxes and street-improvement assessments on the property held in common will be enforced as against one holding a security deed to the cotenant's interest. The 1927 partition decree does not disclose any purpose to determine this question. While it established the amount of the lien and declared it to be a "special lien" against the property awarded to Luther J. Hulsey, it also provided that the "lien" of Fred W. Hulsey under the security deed should attach to this same land — without attempting to determine the relative priority of each. As stated by this court on the previous appearance of this case, the decree merely declared and

sought to enforce a pre-existing lien. The decree throws no light on the rank of that pre-existing lien. The record before us does not disclose the date of the payments of taxes and street-improvement assessments. It is not contended that the grantee in the security deed had notice of any taxes paid before he received his deed. See *Turnbull v. Foster,* 116 Ga. 765 (43 S.E. 42).

The Code, §85-1004, declares: "If one tenant in common receives more than his share of the rents and profits, he shall be liable therefor as agent or bailee of the other cotenant; and in equity the claim for such indebtedness shall be superior to liens placed on his interest by the tenant in possession receiving the profits." It has been held that the lien recognized by this section is superior to a materialman's lien (*New Winder Lumber Co. v. Guest,* 182 Ga. 859, 187 S.E. 63), and to a mortgage (*Hines v. Munnerlyn,* 57 Ga. 32); but that it is inferior to a security deed. *Carmichael v. Citizens & Southern Bank,* 162 Ga. 735 (8) (134 S.E. 771). It was settled on the first appearance of this case that a cotenant who has expended money for the protection of the joint property by the payment of taxes is entitled to a lien against the interest of his cotenant for his share of the taxes paid. If the lien for taxes is the same as a claim for rents and profits, it follows that the security deed here involved is superior to the execution under which the levy was made. On the previous appearance of this case (190 Ga. 598) it was said: "Under the rule announced in *New Winder Lumber Co. v. Guest,* 182 Ga. 859 (187 S.E. 63), the provisions of this section [85-1004] are applicable in favor of a tenant in common who has expended money for the protection of the joint property by the payment of taxes." It will be noted that it was not said that the cotenant's right to contribution for taxes paid was *derived from* that Code section. This could hardly be said in view of the fact that the section clearly purports to deal only with a claim for rents and profits. That opinion further said: "Even if the Code, §85-1004, be taken as merely a codification of previous decisions, recognizing the right of one cotenant to set up and establish a previously existing equitable lien (*Hines v. Munnerlyn,* supra; *Shiels v. Stark,* 14 Ga. 429; *Huff v. McDonald,* 22 Ga. 131, 68 Am. D. 487), still the judgment would be unaffected by the dormancy statutes, since the lien must be regarded, at least as to a reimbursement for taxes and paving assessments, as a lien which pre-existed. . . The judgment . . . amounted to but a recognition for the purpose of enforcement of the pre-existing lien in the plaintiff's favor for advances made for taxes including paving assessments, as set forth in her pleadings. Such judgment did not create a theretofore nonexistent lien."

In order to protect his interest in the joint property it may sometimes become necessary for a tenant in common to pay the taxes against the property as a whole. At the time the claims here involved arose there was no provision of law for one tenant in common paying his proportionate share of the taxes and releasing his interest from the tax lien. See Code, §92-5712, for the law as it now stands on this subject. Since the joint property was liable for all the taxes, payment of the same by one cotenant was payment for all. If he paid the taxes by buying in the property at a tax sale, he could not claim as against his cotenants under the tax deed. However, equity will consider the encumbrance paid off as still existing in order to enforce contribution by the cotenants. This principle was recognized and applied in *Johnson v. Washington*, 152 Ga. 635, 638 (110 S.E. 889), where this court quoted with approval from 7 R.C.L. 873, §67, as follows: "To secure contribution, equity gives to the purchasing tenant a lien upon the interests of the other cotenants. The redeeming tenant in common is, in order to secure contribution, substituted to the same lien that he has redeemed. Pursuant to this principle, one who redeems property from a tax sale, in which property he afterwards becomes a tenant in common, is entitled to have the lien kept alive as against his cotenant, until the latter shall have paid his share of the taxes. . . The general rule is that where one tenant in common, in order to protect his interest, pays a mortgage on the common property, he is entitled to be subrogated to the rights of the mortgagee and to enforce the mortgage as against his cotenants, to the extent of their liability to contribute to the satisfaction of the mortgage." The principle of subrogation is applicable in favor of a cotenant who pays taxes on the common property. 14 Am. Jur. 113, §47; 61 A.L.R. 612. See *Livingston v. Anderson*, 80 Ga. 175 (5 S.E. 48); *Valdosta Bank & Trust Co. v. Pendleton*, 145 Ga. 336 (89 S.E. 216); *Bleckley v. Bleckley*, 189 Ga. 47 (5 S.E.2d, 206). It can not be questioned that the lien of the taxes which the plaintiff in fi. fa. paid was superior to the security deed, whether the lien arose before or after the execution of that deed. Code, §92-5707. The plaintiff in fi. fa. paid some or all of the taxes by "purchasing" the land at tax sales and taking tax deeds. She could not and did not attempt to claim title under these deeds in the partition suit, but she did rely on them for the purpose of enforcing contribution. While the deeds were ineffective as conveyances of title, they were evidence of the taxes paid; and in equity she was subrogated to the lien of the taxing authorities upon the payment of the taxes for the purpose of enforcing contribution. It was this lien which the partition decree sought to declare and enforce. It follows that the execution is entitled to the priority of the tax liens, and that it is superior to the security deed. This case differs from *Carmichael v. Citizens & Southern Bank,* supra, in that the lien there dealt with was not a lien for taxes. For the purposes of this case it is unnecessary to decide whether a merger of title was effected when Luther Hulsey conveyed his equity of redemption to Fred Hulsey, or when Fred Hulsey gave the Bank of Tupelo a warranty deed to the land; for in any event the execution is superior to both the security deed and the equity of redemption. However, see *Knowles v. Lawton,* 18 Ga. 476 (63 Am. D. 290); *Wilder v. Holland,* 102 Ga. 44 (29 S.E. 134); *Woodside v. Lippold,* 113 Ga. 877 (39 S.E. 400, 84 Am. St. R. 267); *Farkas v. Third National Bank of Albany,* 133 Ga. 755 (66 S.E. 926, 26 L.R.A. (N.S.) 496); *Pope v. Hammond,* 168 Ga. 818 (149

S.E. 204). The court did not err in overruling the claimant's objections to the admission in evidence of the execution.

XVI.

THE CONSTITUTION OF THE UNITED STATES, FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

XVII.

28 UNITED STATES CODE, SECTION 2201

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

XVIII.

28 UNITED STATES CODE, SECTION 1331(a)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

XIX.

28 UNITED STATES CODE, SECTION 1343(3)

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:*

*(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

XX.

42 UNITED STATES CODE, SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

XXI.

FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1)

. . . the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, ...